Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1979

CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO and its affiliated LOCAL UNION 1340 of the United Brotherhood of Carpenters & Joiners of Amercia, AFL-CIO,	)	79-1712
Petitioners,	)	NO._____
vs.	)	
REID BURTON CONSTRUCTION, INC., a Colorado Corporation,	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, Carpenters District Council of Southern Colorado and Local 1340 of the United Brotherhood of Carpenters & Joiners of America, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered herein on January 31, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals as to which a writ of certiorari is sought is reported at _____ F.2d _____, 103 L.R.R.M. 2475 and appears in Appendix F. The District Court opinion affirmed in such decision is unreported and appears in Appendix E hereto. Earlier opinions of the District Court and the Court of Appeals are reported at 91 L.R.R.M. 2873 (D.Colo. 1974) and 535 F.2d 598, *cert. denied,* 429 U.S. 907 (1976), and appear, respectively, in Appendices A and B.

JURISDICTION

The Court of Appeals' judgment and opinion were dated and entered of record on January 31, 1980, affirming the judgment of the District Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Where there was no intentional or express waiver of an arbitration defense in a §301 action for breach of a no-strike clause, did the Court of Appeals err in concluding that the arbitration defense was constructively waived through (1) the initial denial of §301 jurisdiction by one of the Petitioners, (2) the Petitioners' active participation in pre-trial proceedings, and (3) the absence of an immediate request by the Petitioners that the action be stayed pending arbitration?

STATEMENT OF THE CASE

On July 13, 1973 the Respondent Reid Burton Construction, Inc. [hereinafter, Burton] filed a Complaint [App. C at C-1] in the United States District Court for the District of Colorado against the Petitioner Carpenters District Council of Southern Colorado [hereinafter, District Council], the Petitioner Local 1340 of the United Brotherhood of Carpenters &

Joiners of America [hereinafter, Local 1340] and the Colorado Building and Construction Trades Council [hereinafter, Building Trades Council]. The Complaint alleged jurisdiction under §301 of the Labor Management Relations Act of 1947, as amended [hereinafter, Act], 29 U.S.C. §185. [*Id.* at C-2] The Complaint stated, *inter alia*, that the District Council and Local 1340 were "parties" to and had breached certain provisions of a collective bargaining agreement with Burton "known as 'Carpenters' Agreement, Carpenters District Council of Southern Colorado'"[1] by (1) attempting to modify Burton's obligations under such agreement during its term and (2) inducing, encouraging and/or coercing employees to respect a picket line established by the Building Trades Council. [*Id.* at C-3-4] The Complaint was silent as to the existence, if any, of grievance and/or arbitration provisions in the collective bargaining agreement.

All Defendants filed motions to dismiss pursuant to Fed.R.Civ.P. 12 [*Id.* at C-6-7] The District Council and Local 1340 did not, in their motion or brief in support thereof, note the existence of arbitration provisions in the collective bargaining agreement but did argue that the injunctive relief requested in Burton's Complaint was barred under the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq.*, in the absence of allegations satisfying the criteria for injunctive relief set forth in *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 254 (1970) [*Id.* at C-14-15] On September 14, 1973 Burton filed an Amended Complaint deleting all requests for injunctive relief. [*Id.* at C-16] The District Court subsequently denied the District Council and Local 1340's Motion to Dismiss, and on November 9, 1973 each defendant answered the Amended

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[1]The correct denomination of the collective bargaining agreement was "Carpenters Building Construction 1972-1975 Agreement — Carpenters District Council of Southern Colorado."

Complaint. [*Id.* at C-21] Their Answers admitted jurisdiction under §301 as to the District Council and denied jurisdiction thereunder as to Local 1340. Their Answers further admitted that the District Council was a party to the collective bargaining agreement but denied such status as to Local 1340. [*Id.*] Their Answers asserted ten affirmative defenses, the third of which read:

> "This Court has no jurisdiction over the subject matter of this action because it involves the interpretation and application of the collective bargaining agreement. . .which is within the sole and exclusive province of the dispute resolution machinery contained therein which provisions contain the exclusive remedy for breaches thereof." [*Id.* at C-25]

Joined with their Answers was a Counterclaim by the District Council alleging, *inter alia* that Burton, by failing to pursue the grievance and arbitration procedures contained in the collective bargaining agreement, was in violation of the agreement. [*Id.* at C-27] Burton's Reply to the Counterclaim affirmatively alleged that the "Defendants' [*sic*] Counterclaim is barred by the application of the doctrine of laches." [*Id.* at C-77] The Reply further alleged that the Counterclaim itself was subject to the grievance and arbitration procedures of the collective bargaining agreement and that the District Court was, as a consequence, without jurisdiction over it! [*Id.*]

Burton's Reply to the District Council's Counterclaim was filed on December 5, 1973. On March 11, 1974 the parties filed Pre-Trial Statements which, generally speaking, reiterated the several positions assumed in the earlier pleadings. [*Id.* at C-21, 32] Burton's Pre-Trial Statement, however, did not mention any issue of arbitration as a question of law or fact to be

determined by the Court. [*Id.* at C-31-32] The District Council and Local 1340's Pre-Trial Statement certified as issues of fact and law questions dealing with the arbitrability of the subject matter of the Amended Complaint. [*Id.* at C-34-39] On July 19, 1974 the District Council and Local 1340 filed with the District Court a Suggestion to Dismiss pursuant to Fed.R.Civ.P. 12(h)(3) and a supporting brief, arguing that Burton's claim was subject to mandatory resolution through the grievance and arbitration provisions of the collective bargaining agreement. [*Id.* at C-40-41] In the supporting brief the District Council and Local 1340 stated, "[a]lthough heretofore the Defendants have questioned whether the Defendant Local 1340 was a party to the collective bargaining agreement entered into by Reid Burton and the Carpenters District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreement. . . .As a consequence, both Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 would be bound by an arbitral award issued in accordance with the provisions of Article XIV of the collective bargaining agreement." [*Id.* at C-44] Simultaneously, the District Council and Local 1340 filed an Amended Pre-Trial Statement which, *inter alia*, admitted §301 jurisdiction as to Local 1340 but denied that it was a "party" to the collective bargaining agreement. [*Id.* at C-44,46] Burton then filed an additional Pre-Trial Statement on July 23, 1974 which, as its initial Pre-Trial Statement, was silent as to any issue involving the arbitrability of the subject matter of its Amended Complaint or the Counterclaim.

On September 23, 1974 the Court entered a lengthy Pre-Trial Order. The Pre-Trial Order did not list as a contested issue of fact or law any equitable defense by Burton to its obligation to arbitrate. On the first day of trial, however, Burton raised the equitable defense issue in its Trial Brief, noting that,

"[u]ntil recently, Defendant Local 1340 was denying it was party to the collective bargaining agreement. Thus, because of the pleading tactics of the Defendant Union [*sic*], the matter has progressed up to the point of trial and therefore the right to arbitrate, if it ever existed, should be deemed waived." [*Id.* at C-75] During the trial, counsel for the District Council and Local 1340 stated, in response to questions from the District Court, that arbitration of Burton's claim should be ordered pursuant to *Boys Markets* and further stated that no such affirmative request for arbitration had been made by the District Council and Local 1340 until so requested "today" by the Court. However, counsel also stated that the District Council anl Local 1340 had consistently maintained their arbitration defense since the filing of their Answers and the concomitant position that resolution of Burton's claim was exclusively subject to the grievance and arbitration provisions of the collective bargaining agreement. [App. F at F-4]

On November 19, 1974 the District Court issued its Memorandum Opinion in which it made "findings and conclusions on all questions directly or indirectly, and properly or improperly before me." [App. A at A-4-5] Included in such findings and conclusions was a determination that the District Council and Local 1340 had "flagrantly violated" the no-strike provision of the collective bargaining agreement and that Burton had been damaged thereby in the amount of Ten Thousand Eight Hundred One Dollars and Ninety-Seven Cents ($10,801.97). [*Id.* at A-10] The District Court nonetheless then held that the arbitration provisions of the collective bargaining agreement were broad enough to encompass employer-initiated grievances alleging breach of its no-strike provisions. The court further held that *Operating Engineers Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972), required that an arbitrator determine "whether defendants can insist on arbitration in

light of their conduct leading up to and during this case." [*Id.* at A-11]

The Court of Appeals sustained the District Court's resolution of those issues dealing with whether the grievance and arbitration provisions of the collective bargaining agreement admitted resolution for employer-initiated grievances alleging breach of its no-strike provisions. However, the Court of Appeals reversed the District Court as to its determination that an arbitrator should resolve all equitable defenses raised by Burton to its duty to arbitrate. Specifically, the Court of Appeals remanded the case to the District Court for determination of "whether the union should be prevented from demanding arbitration because of 'evasive' and 'dilatory' pleading practices before the court." [App. B at B-12]

No further evidence was taken upon remand, and the District Court determined the waiver issue on the record made during the intitial proceedings. Upon such record the District Court concluded that the District Council and Local 1340 were prevented from maintaining their arbitration defense because of "evasive" and "dilatory" pleading tactics. The Court stated that it took a "dim view of the Defendants' whirlygig positions during the course of the litigation." [App. E at E-3] It then stated that "I think that advertantly or inadvertantly the Court and Plaintiff's counsel were led down a primrose path by a failure on the part of Defendants' counsel to communicate to the Court and opposing counsel in a timely way the argument of Defendant that this dispute was one subject to arbitration." [*Ibid.*] Although the reasoning behind such conclusion was not entirely clear, the District Court appeared to base its decision on Defendant Local 1340's admission to §301(a) jurisdiction in July, 1974 and its failure to state earlier in the proceedings that, while not a party to the collective bargaining agreement,

it was bound by such agreement's terms. The Court of Appeals affirmed the District Court, applying the clearly erroneous standard to the District Court's conclusions. In relevant part it stated:

> "...[W]e cannot say that the finding of waiver by Defendants District Council and Local 1340 was clearly erroneous. We find the initial and consistent denial for one year of Local's status as a party; the ambiguous or confusing ultimate stance on this point; Defendants' participation in numerous hearings, pretrial conferences, motions and other pleadings, and the deposing of witnesses; and their assertion of the arbitration clause merely as a defense in bar and a counterclaim, without insisting upon or demanding immediately, as was their duty, ...enforcement of that provision." [App. F at F-10]

REASONS FOR GRANTING WRIT

THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS ON THE QUESTION OF WAIVER OF THE ARBITRATION DEFENSE AND FAILS TO CONSIDER MEANINGFULLY THE STRONG FEDERAL POLICY FAVORING ARBITRATION OF LABOR DISPUTES. THE DECISION, MOREOVER, PRESENTS AN ISSUE OF SUBSTANTIAL FEDERAL IMPORTANCE WHICH HAS NOT BEEN, BUT SHOULD BE, DETERMINED BY THIS COURT.

I.

Commencing with *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court has evolved an intricate body of federal substantive law under §301 of the Act. The core prin-

ciple governing such evolution has been the Court's recognition of §301's integral importance to the maintenance of labor peace. Thus, the term "contract" in §301(a) has been expansively contrued to include all agreements "between employers and labor organizations significant to the maintenance of labor peace between them." *Retail Clerks Local 128 v. Lion Dry Goods, Inc.*, 397 U.S. 1728 (1962). *Lincoln Mills* itself clearly determined that specific performance of contractual undertakings served such purpose. 353 U.S. at 455. Of particular relevance instantly is that the contractual undertaking sought to be specifically enforced in *Lincoln Mills* was an agreement to arbitrate disputes. *Id.* at 449. Decisions of the Court subsequent to *Lincoln Mills* have firmly established labor arbitration as the prime means of effecting §301's objectives. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corporation*, 363 U.S. 593 (1960); *Drake Bakeries, Inc. v. Bakery Workers Local 50*, 370 U.S. 254 (1962); *Teamsters Local 174 v. Lucas Flour Company*, 369 U.S. 95 (1962); *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261 (1964); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Boys Markets, Inc. v. Retail Clerks Local 770, supra; Operating Engineers Local 150 v. Flair Builders, Inc., supra; Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974); *Buffalo Forge Company v. United Steelworkers*, 428 U.S. 397 (1976); *Nolde Bros., Inc. v. Bakery Workers Local 358*, 430 U.S. 243 (1977). However, "[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement." *United Steelworkers v. American Manufacturing Company*, 363 U.S. at 567.

The significance of the above policies to the instant petition is apparent. To the extent that constructive "equitable"

defenses to the duty to arbitrate are recognized, even with respect to "in-trial conduct," the federal commitment to arbitration of labor disputes is affected. If murky parameters are set as to the circumstances under which such equitable defenses can be sustained, incentive will be created for parties to seek direct recourse to the judicial process in the hope that the course of litigation will present a fortuitous, equitable defense to their duty to arbitrate. Indeed it was the Plaintiffs who proceeded directly to court in the within matter. It was the Defendant unions who initially raised the existence of the parties' mutual obligations to resolve the dispute through arbitration. Maintenance of §301's objectives can only be achieved by relegating the parties to the contractually prescribed arbitral forum except under the most compelling proof of intentional abandonment of the arbitration defense or of intentional misrepresentation of position directly related to the duty to arbitrate. Where, as here, the District Council and Local 1340 have raised in a procedurally proper and timely fashion the arbitration defense and where there is no finding of intentional misrepresentation of position as to such defense, the federal policy of favoring arbitration of labor disputes must be given effect.

The Court of Appeals, while noting in passing the strong federal policy favoring arbitration of labor disputes,[2] concluded that the District Council and Local 1340 had waived their right to compel Burton to pursue its claim through the applicable grievance and arbitration procedure by (1) denial of Local 1340's status as a "party" to the collective bargaining agreement; (2) active participation in various aspects of the litigation; and (3) assertion of the arbitration provision as an affirmative defense and counterclaim "without insisting upon or demanding immediately, as was their duty. . . , enforcement of

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[2]App. F at F-8

that provision." [App. F at F-10] The Court of Appeals did not, however, point to any conduct which reflected an intentional relinquishment or abandonment by the District Council and Local 1340 of the arbitration defense; rather, its conclusion that waiver existed was premised on a finding of constructive waiver and was derived largely from cases applying §3 of the Federal Arbitration Act, 9 U.S.C. §3.[3] The Court of Appeals' reasoning conflicts with decisional authority from other circuits and raises a substantial federal question as to what burden a party to a collective bargaining agreement has in asserting the defense that the subject matter of a civil action is subject to mandatory and binding arbitration.

II.

Neither the District Court nor the Court of Appeals concluded that the denial of Local 1340's "party" status to the collective bargaining agreement was asserted in bad faith or was

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[3]The Court of Appeals applied the "clearly erroneous" standard to the District Court's "findings." [App. F at F-11]. However, as indicated in the text, the District Court's decision was predicted on the pleadings and certain statements made by counsel during trial. "This was essentially a 'paper case.' It did not unfold by the testimony of 'live' witnesses. . . ." *U.S. v. General Motors Corp.*, 384 U.S. 127, 141n.16 (1966); *accord, In re Clemens*, 472 F.2d 939, 94ln.l (6th Cir. 1972); *see generally U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 394-95 (1948). As further noted by Justice Fortas in *General Motors*, "the question here is not one of 'facts,' but consists rather of the legal standard required to be applied to the undisputed facts of the case. . . ." *Ibid.* There is instantly no question that the District Council and Local 1340 did not, as a matter of fact, waive the arbitration defense; *i.e.*, intentionally relinquish the right to assert such defense. The absence of such waiver is unequivocally established through a review of the pleadings. The issue herein is, instead, whether, *as a matter of law*, the arbitration defense should be deemed constructively waived because of, most significantly, the absence, until trial, of a request by the District Council and Local 1340 that arbitration be ordered. There is, of course, no question that the District Council and Local 1340 had previously asserted and maintained their position that Burton's claim for breach of the no-strike clause should be dismissed because of its obligation to arbitrate such claim rather than to present it to the District Court for resolution.

designed to delay the proceedings.[4] The subsequent admission of §301 jurisdiction by Local 1340 was, importantly, of no significance as to whether the arbitration defense, asserted by both it and the District Council, was valid. Manifestly, if §301 jurisdiction was present, it could only derive from the collective bargaining agreement which provided for final and binding arbitration. If, conversely, §301 jurisdiction had not been present as to Local 1340, the action would have been dismissed as against it. In either instance, however, the District Council would have remained as a party to the action and the arbitration defense would necessarily have been determined.

In *Controlled Sanitation Corp. v. Machinists District 128*, 524 F.2d 1324 (3d Cir. 1975), *cert. denied*, 424 U.S. 915 (1976), the Third Circuit rejected a plaintiff's argument that a defendant Union, which preserved through trial the dual defenses that it was not bound by a collective bargaining agreement but that, if it were, the plaintiff's claim was subject to mandatory arbitration, had thereby waived the arbitration defense. The defendant had initially moved to dismiss the action on the basis that no collective bargaining agreement existed between itself and the plaintiff; this motion was denied with the District Court noting the defendant's failure to seek a stay pending arbitration. The plaintiff then filed an amended complaint, and the defendant again moved to dismiss on the basis that no collective bargaining agreement existed and, alterna-

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[4]The significance of the "party" status issue to the District Council and Local 1340 lay in their desire to take no position which, either in this litigation or in later controversies, would undermine the exclusive authority of the District Council to administer the collective bargaining agreement, including the grievance and arbitration provisions of that agreement. *See United Mine Workers 12405 v. Martin Marietta Corp.*, 328 F. 2d 945, 948 (7th Cir. 1964); *Longshoremen's Local 13 v. Pacific Maritime Ass'n*, 441 F.2d 1061, 1064 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); *see also Black-Clausen Co. v. Machinists Local* 355, 313 F.2d 179, 184 (2d Cir. 1962).

tively, that the employer was obligated to arbitrate its claim. The second motion to dismiss was denied without reaching the question of the duty to arbitrate. The denial of the second motion to dismiss came fourteen months after the filing of the complaint. The defendant thereafter filed an answer which preserved the arbitration defense. The matter proceeded to a bifurcated hearing on the questions of whether a collective bargaining agreement existed and, if so, of the amount of dam ages suffered as a result of the strikes involved. After the jury assessed damages in the amount of $208,000, the defendant moved for a new trial, asserting that, once a collective bargaining agreement had been found, all issues should have been resolved through arbitration. In a footnote the majority of the Third Circuit dismissed the employer's contention that the defendant was estopped from asserting the arbitration defense while simultaneously claiming that no collective bargaining agreement existed:

> "The Unions took the position, as has been indicated, that there was no contract and hence no arbitration agreement in existence, but they clearly reserved the right that should the Court find otherwise then the dispute should be submitted to arbitration. The Company seems to take the position that the Unions are in effect estopped from asserting such a defense because they originally insisted there was no contract. We cannot agree with this position, and it seems to be unsupported by either adequate authority or logic." *Id.* at 1328n.3.

The Court of Appeals noted *Controlled Sanitation* but "doubt[ed] the persuasiveness of the majority opinion there." [App. F at F-11n.8] The Court then stated that the decision was distinguishable since the defendants "clearly reserved the right that the dispute should be submitted to arbitration" if the

collective bargaining agreement was found applicable. [*Ibid.*] The Court of Appeals' attempt at distinguishing *Controlled Sanitation* can, however, only be sustained if the pleadings herein are ignored. Both the District Council, as to whom "party" status was not an issue, and Local 1340 preserved the arbitration defense which clearly stated that Burton's remedy for breach of contract lay exclusively under the applicable grievance and arbitration provisions.[5] Thus, while the precise facts herein may differ from those in *Controlled Sanitation*, those differences are not material to the reasoning of the Third Circuit's decision.

III.

That active participation in a civil action will, without more, give rise to constructive waiver, even under §3 of the Federal Arbitration Act, is an indefensible position.[6] *Controlled Sanitation*, although not directly addressing §3 default, clearly indicates a contrary conclusion. *See generally Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968); *Robert*

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[5]See Petitioners' Answer and Counterclaim (November 9, 1973) ¶6 and Third and Eighth Affirmative Defenses [App. C at C-22-26]; Petitioners' Pre-Trial Statement (March 11, 1974), Parts 5.(A)b, 5.(B)1 and 6, 6.(A)2 and 3, 6.(B)7 and 8 [App. C at C-33-39]; Petitioners' Suggestion to Dismiss Pursuant to Rule 12(h)(3) (July 10, 1974), [App. C at C-40-44]; Petitioners' Amended Pre-Trial Statement (July 23, 1974) Parts 4, 5.(A)b, 5.(B)5, 6.(A)2, 6.(B)7 [App. C at C-45-51]; Pre-Trial Order (September 28, 1974), Parts 5.(A)b; 5.(B)b.6, 6.(A)b.2 and 3; 6.(B)b.7 [App. C at C-59-74].

[6]Section 3 reads:

> "If any suit or proceeding be brought in any of the courts of the United States upon issue referrable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referrable to arbitration under such an agreement, shall on application of one of the parties stay a trial of the action until such arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration.*" [Emphasis supplied]

Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 412-13 (2d Cir. 1959), *appeal dismissed*, 364 U.S. 801 (1960). Moreover, the within matter was, as to the arbitration defense, complicated by Burton's contention that the applicable grievance and arbitration provisions were available only to employee or union grievances and did not otherwise encompass alleged breaches of the no-strike clause. Burton pursued this position through the District Court level and to the Court of Appeals, which finally rejected it. [App. B at B- 4- 8]. There was, therefore, substantial dispute as to whether Burton's claim was subject to arbitration. Under these particular circumstances and in general, it is inconsistent with modern pleading practices to require a party to forego trial preparation because of the possibility that such preparation may result in the constructive waiver of an otherwise properly preserved defense.[7]

IV.

The Court of Appeals' decision, for the first time, conditions maintenance of an arbitration defense upon the affirmative request that the civil action be stayed and that the matter be submitted to arbitration. Such a rule is manifestly inconsistent with modern pleading practices and with the decisions of other circuits. *Shanferoke Coal & Supply Corp. v Westches-*

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[7]It should be noted that Burton had procedures available to it to avoid any alleged prejudice which might be suffered through discovery not otherwise available in arbitration. Burton could have moved to strike the arbitration defense pursuant to Fed.R.Civ.P. 12(f). *Hilti, Inc. v. Oldach*, 392 F.2d 368, 372 (1st Cir. 1968). Burton could further have moved for protective orders under Rule 26. *Econo Car Int'l, Inc. v. Antilles Car Rental, Inc.*, 61 F.R.D. 8, 10 (D.V.I. 1973), *rev'd on other grounds*, 499 F.2d 1391 (3d Cir. 1974); *Mississippi Power Co. v. Peabody Coal Co.*, 69 F.R.D. 558, 565 (S.D.Miss. 1976); *H.K. Porter Coal, Inc. v. Steelworkers Local 37*, 400 F.2d 691, 695-96 (4th Cir. 1968); *Electrical Workers v. Westinghouse Elec. Corp.*, 48 F.R.D. 298, 299 (S.D.N.Y. 1969); *accord, Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 352n.17 (1978).

ter Serv. Corp., 70 F. 2d 297, 299 (2d Cir. 1934), *aff'd*, 293 U.S. 449 (1935); *Kulukundis Shipping Co. S/A v. Amtorg Trading*, 126 F. 2d 978, 989 (2d Cir. 1942); *Martin Marietta Aluminum, Inc. v. General Electric Co.*, 586 F.2d 143, 146 (9th Cir. 1978); *see also Machinists Aircraft Lodge 703 v. Curtiss-Wright Corp.*, 169 F.Supp. 834, 841 (D.N.J. 1959); *Kastanias v. Nationwide Auto Transporters, Inc.*, 390 F.Supp. 721, 722 (W.E.Pa. 1975). Thus, the instant collective bargaining agreement requires the "aggrieved party" to initiate proceedings before a board of adjustment, which is a condition precedent to arbitration. The mere assertion that Burton's exclusive remedy existed under the grievance and arbitration provisions explicitly signalled recognition by the District Council and Local 1340 of the mutual obligations existing thereunder.

The imposition of a duty to demand *immediately* arbitration creates an incentive for parties to take disputes, which should be resolved through the grievance and arbitration provisions of collective bargaining agreements, directly to court. The incentive, as noted, is the hope that the litigation may present some fortuitous "equitable defense" to the duty to arbitrate. Instantly, Burton stumbled upon such a defense even while evading the obligation to arbitrate its claim and while such obligation was properly at issue in clear and unmistakable terms. Prior to the instant decisions, no obligation existed for a party claiming an arbitration defense to immediately move for a stay pending arbitration as a condition precedent for the maintenance of its arbitration defense.[8] If litigants such as the District Council and Local 1340 are, as held by the Court of Appeals, required to utter magic words or engage in

---

[8]This Court has repeatedly recognized that courts dealing with labor management parties cannot adopt formalistic rules which defeat the arbitration obligation. To sanction it here will ensure the efforts of some labor management parties to proceed directly to court in furtherance of a desire to avoid an arbitration obligation.

formalistic pleading rituals not included under the Federal Rules of Civil Procedure or even adumbrated in this Court's decisions, the parameters of such requirement should be definitively established. Moreover, the District Council and Local 1340 believe that neither magic words nor formalistic rituals are required under the Federal Rules or relevant decisional authority and that the Court of Appeals' reasoning is patently erroneous.

V.

In summary, the District Council and Local 1340 believe that the Court of Appeals' decision is inconsistent with the decisions of other circuits and that it failed to accord proper weight to the strong federal policy favoring arbitration of labor disputes. Where, as here, the arbitration defense has been properly raised, preserved and consistently maintained, it is incongruous with notions of modern pleading practice to hold that such defense has been constructively waived. Finally, a finding of waiver under such circumstances undermines the federal policy favoring arbitration of labor disputes by effectively rewarding litigants who improperly solicit judicial involvement in disputes subject to mandatory and binding arbitration under collective bargaining agreements. The Court of Appeals' decision creates confusion in an area of critical concern to employers and labor organizations, and such confusion should be dispelled by this Court.

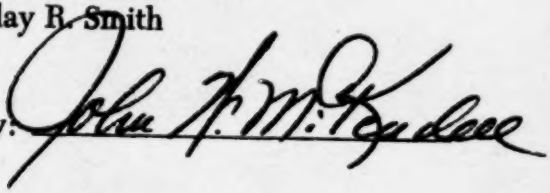
CONCLUSION

The Petitioners respectfully request the Court to issue a

writ of certiorari to the Tenth Circuit Court of Appeals for review of its decision herein.

Respectfully submitted,

McKENDREE & LUBIN
John W. McKendree
Clay R. Smith

By: 

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Supreme Court, U. S.
FILED
APR 29 1980
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1979

CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO and its affiliated LOCAL UNION 1340 of the United Brotherhood of Carpenters & Joiners of Amercia, AFL-CIO,

Petitioners,

vs.

REID BURTON CONSTRUCTION, INC., a Colorado Corporation,

Respondent.

79-1712

NO._____

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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APPENDIX A

DISTRICT COURT MEMORANDUM OPINION AND AMENDMENT THERETO*

1. Memorandum Opinion (November 17, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-5184

REID BURTON CONSTRUCTION, INC., a Colorado corporation,

Plaintiff

vs.

CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, LOCAL 1340 of the UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL, unincorporated associations and labor organizations,

Defendants

*The dates on which the District Court's Memorandum Opinion and Amendment thereto reproduced in this appendix were filed with the clerk of the District Court are set forth in parentheses following the caption on the document. The party caption of the Order Amending Findings and Conclusions has been deleted for economy of space.

MEMORANDUM OPINION

WINNER, Judge

By amended complaint brought under 29 U.S.C. §185, plaintiff sought damages against (a) Carpenters District Council of Southern Colorado, (b) Local 1340 of the International Brotherhood of Carpenters & Joiners of America, AFL-CIO, and (c) Colorado Building and Construction Trades Council. The amended complaint alleged in material part:

> "5. Plaintiff and Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, AFL-CIO, are parties to a collective bargaining agreement known as 'Carpenters' agreement, Carpenters District Council of Southern Colorado.' *At all times material herein such collective bargaining agreement was in full force and effect and governed the relationship between the aforementioned parties.* [emphasis supplied].
> "6. Said collective bargaining agreement contains promises by Local 1340 and by the Carpenters District Council of Southern Colorado and (sic) they and their members will not strike or picket during the term of the agreement
> . . . .
> "7. . . . Defendant Colorado Building and Construction Trades Council is authorized by its constituent unions, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, to represent them for purposes relating to labor relations, and as such the Defendant Colorado Building and Construction Trades Council is an agent of its constituent unions."

By order of November 23, 1973, Colorado Building and Construction Trades Council was dismissed from the case

under rules of contract and agency law, because, "Under the averments of the complaint here, and taking into account the actual parties to the contract, it can be said that Colorado Building and Construction Trades Council is concerned with this dispute only as an agent for a disclosed principal.

The other two defendants answered, and in paragraph 5 of the amended answer it is said:

> "5. *The above named defendants deny the allegations in paragraph 5 of the Amended Complaint.* By way of further answer, the above named defendants aver that plaintiff and defendant District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreemnt. . . . As a consequence, both Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 would be bound by an arbitral award issued in accordance with the provisions of Article XIII of the collective bargaining agreement."

July 10, 1974, the Local said that it *is* bound by the contract and that the dispute is subject to arbitration and that the case should be dismissed. Defendants argue that they have not changed their position, and they explain that the time spent by plaintiff's counsel and the court in preparing the case for trial was wasted time because plaintiff's counsel and the court should have read more literally defendants' assertions that Local 1340 was not a party to the contract and should not have been taken aback by defendants' July 10, 1974, assertion that the non-party local was bound by a contract to which it is not a party, and this even though defendants had denied that they were governed by the agreement. I have said on the record and I repeat here that sophistry such as this does not

help a court in its futile efforts to keep up with an overcrowded docket.

Another pretrial conference was held after the suggestion to dismiss was filed, and the pretrial order contains the following partial statement of defendants' position as to the court's jurisdiction.

> "Although the Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 submit that this Court does not have jurisdiction under Section 301 to reach the merits of the Plaintiff's claims for breach of contract, this Court does have threshold jurisdiction under Section 301 to determine whether the provisions of Article XIII of the collective bargaining agreement provide for final and binding arbitration of the subject matter of Plaintiff's claim. Threshold jurisdiction for this determination lies under Section 301 because Plaintiff's claim involves an alleged violation of a contract between an employer and a labor organization. Furthermore the stance that the existence of applicable arbitration provisions deprives this Court of subject matter jurisdiction is not inconsistent with the stance that the Court has threshold jurisdiction under Section 301. Simply stated, the Court has jurisdiction to determine whether the Plaintiff's claims of breach of contract are substantively arbitrable, but once such claims are determined to be substantively arbitrable, the jurisdictional grant of authority under Section 301 ceases."

With this latest version of defendants' ever changing position being filed a scant week in advance of the trial date, the case proceeded to trial on all issues, the case was taken under advisement and post trial briefs were allowed. They have been filed, and, have been beleagured by this case to the extent that I have, I shall make findings and conclusions on all questions

directly or indirectly, and properly or improperly before me. I do this to avoid if possible any risk of having to try the case all over again if the Court of Appeals disagrees with my conclusions.

Plaintiff and Carpenters District Council of Southern Colorado are parties to a labor contract, and defendant Local 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO has now made a judicial admission that it is bound by that contract. Article XIII of the contract is the important article here. It provides in material part:

"ARTICLE XIII
"CONTRACTURAL DISPUTES

"Section 1 - In the event that a dispute arises involving the application or interpretation of the terms of this agreement, reasonable and diligent effort shall be exerted by the employee with the employer's representative, the employee contacting the business representative through the steward, and/or the business representative with the employer's representative. If the two parties are unable to reach a settlement, the dispute shall be reduced to writing and the aggrieved party shall notify the other party the dispute is being referred to a Board of Adjustment.
"Section 2 - The Board of Adjustment shall be composed of two representatives selected by the employer from contractors signatory to this agreement and two representatives selected by the union. The Board of Adjustment shall meet not later than five (5) days after a grievance has been presented to it.

"Should the Board of Adjustment be unable to render a majority decision after convening and hearing the dispute, the Board shall, within 48 hours, select an impartial

chairman who is not directly connected with the building or construction industry, either as contractor or union. Should the parties be unable to agree on the selection of the chairman within said 48 hours, the same shall be selected from a panel of five (5) names submitted by the director of the Federal Mediation and Conciliation Service in Washington, D.C. The party initiating the dispute shall strike first on said list.

. . . . . .

"Section 3 - The majority decision of the Board of Adjustment shall be final and binding upon each party to the dispute in each instance and shall be within the scope and the terms of this agreement.

. . . . . .

"Section 5 - The parties agree there shall be no strike, work stoppage, slowdown, lockout or other interruption of the continuity of the work in progress during the life of this Agreement unless a party refuses to abide by or to implement the majority decision of the Board of Adjustment."

While the contract was in full force and effect, and while plaintiff was living up to all of its terms, Colorado Building and Construction Trades Council wrote a letter to plaintiff which said:

"Gentlemen:

"We are presently engaged in a program to standardize wages and working conditions in the construction industry in this area. To assist in accomplishing this, we are requesting builders and general contractors to sub-contract

jobsite work only to contractors who are parties to a contract with one of the unions affiliated with our council. A proposed draft of such agreement is enclosed for your consideration. You will note that it applies only to future work for which no sub-contract has been executed. Your signing of the proposed agreement would therefore not require you to terminate the services of any contractor for any job which is already under contract.

"We intend to acquaint the public, by means of picketing and other forms of communication, with the names of builders and general contractors who do not enter into our sub-contracting agreement. In the event that your company is the subject of such picketing, it will be conducted at your general offices and other places in which you may be engaged in business. The picketing will be directed to the public, and not to your contractors, suppliers, or employees. Its sole purpose will be to contest your right to the goodwill of the community. We wish to emphasize that we are not requesting or seeking, and do not desire, you to cease or refrain from doing business with any person, firm or corporation. Nor do we claim to represent, or seek or organize, any of your employees, and we do not request or desire your recognition as their representative.

"If you have any comment or question concerning this matter, please communicate the same by letter, which will be referred to our Executive Board for appropriate consideration and action. Neither the undersigned, nor any other person, has authority to discuss this matter in behalf of the union."

Plaintiff didn't go along with the request of the Building and Construction Trades Council, and, true to its word, pickets

showed up at two of plaintiff's jobs in Fort Collins, Colorado, (a) the Everitt Office Building job, and (b) the Markley Motors job. Leaflets were handed out by the pickets, and these leaflets said:

"MESSAGE TO THE PUBLIC

"We are picketing REID BURTON because of his refusal to sign a sub-contracting agreement for future job site work. If you believe in the cause of fair wages and working conditions for American workers, please telephone or write to Reid Burton and request him to sign our sub-contracting agreement for future job site work.

"Our picket is not directed against any other employer, and we have no dispute with any other employer on this project.

"Thank you!

"COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL

"The person giving you this leaflet is not authorized to discuss this or any other matter in behalf of the Colorado Building and Construction Trades Council."

Additionally, signs were posted which read:

"REID BURTON CONST. CO. Has No Contract With Colorado Building & Constr. Trades Council. We have no dispute with any other person or Co. on the project."

A responsible officer of the Local admitted to a representative of plaintiff that there was no claim by defendants of a contract violation by plaintiff, and defendants made a tongue in cheek disavowal any intention of a strike. However, for the most part the carpenters didn't show up for work, and defendants say that their failure to work was not because of any strike, but, rather, the mens' conduct was purely "voluntary" individual action. Defendants assert that they neither influenced, persuaded nor coerced the union carpenters not to work. The record belies defendants' pious contentions. Two of the union carpenters didn't "voluntarily" stay away from work. They made the mistake of voluntarily showing up for work. Retribution was swift. The business representative of Local 1340 filed charges against each of the carpenters who didn't "voluntarily" stay home. They were charged with, "Working behind a picket line duly authorized by a subordinate body of the United Brotherhood (Building and Construction Trades Picket) Working on Markley Motors Building, South College Avenue, Fort Collins, Colorado, 80521, on or about the 13th of March, 1973." To add insult to injury, although one of the carpenters lived in Longmont and the other in Ft. Collins, Colorado, their trial was held in Montrose, Colorado. As sure as death and taxes, they were convicted and fined, but as a result of later N.L.R.B. action, the fines were set aside. Although I have admitted to naivete in relying on the good faith of counsel, I am not so gullible as to accept defendants' protestations of innocence of violation of the no strike clause of the contract. Communications between all three named defendants were open at all times, and the entire episode was one of tripartite self help. The record in this case convinces beyond peradventure that Carpenters District Council of Southern Colorado violated the no strike clause of the labor contract to which it was a party and that Local 1340 of the International Brotherhood of Carpenters & Joiners of America, AFL-CIO violated the same pro-

vision of the same contract which the local has now judicially admitted was binding on it. The defendants flagrantly violated the contract jointly and severally.

Plaintiff sustained damage as a result of those violations. The fact of damage is certain, although the amount of damage is somewhat less certain. Defendants did not controvert the damage testimony, and the record made in this case permits a finding, and I find that as a result of defendants' contract violations, plaintiff was damaged in the amount of $6,392.52 on the Markley Motors job and in the amount of $4,409.45 on the Everitt job. Thus plaintiff was damaged in the total amount of $10,801.97 as a direct and proximate result of defendants' flagrant violations of the contract's provisions.

Having found that defendants broke their promise not to strike and having found the amount of damages resulting to plaintiff as a result of defendants' breach of contract, I must face up to the question of whether I have jurisdiction to enter judgment against defendants. To do this, I must decide whether the arbitration clause covers the dispute and makes arbitration mandatory, and, I must decide whether because of waiver, repudiation ,estoppel, laches or any other reason, the matter should not be sent to an arbitrator for decision.

The scope and effect of the arbitration clause in question must be decided under Drake Bakeries v. Bakery Workers (1962) 370 U.S. 254, and Atkinson v. Sinclair Refining Co. (1962) 370 U.S. 238, opinions by Justice White handed down the same day. Atkinson held that only employee grievances were subject to arbitration, while Drake Bakeries held that all contract disputes had to be arbitrated. In Atkinson, Justice White explained:

> "In Drake Bakeries, Inc. v. Local 50, post, decided this day, the question of arbitrability of a damage claim for

breach of a no strike clause is considered and resolved in favor of arbitration in the presence of an agreement to arbitrate 'all complaints, disputes or grievances arising between them [i.e. the parties] involving . . . any act or conduct re relation between the parties."

Admittedly, Article XIII of the Carpenters' contract is not word for word with either Atkinson or Drake Bakeries, and plaintiff says that it is more comparable to Atkinson than it is to Drake Bakeries. Defendants, of course, take the opposite position. Without extended discussion, but after much thought, and after study of the many Supreme Court cases favoring arbitration, I must reluctantly agree with defendants, and I hold that the dispute is encompassed within the mandatory arbitration provisions of the labor contract in question.

The question then arises as to whether defendants can insist on arbitration in light of their conduct leading up to and during this case. That is to say, are defendants prevented from insisting on arbitration under principles of waiver, repudiation, estoppel, laches or other equitable principles; and is this question to be decided by me or by an arbitrator? What I shall say presently will emphasize why I wholeheartedly agree with the views expressed by Justice Powell in International Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders, (1972) 406 U.S. 487, but Justice Powell was speaking in dissent joined in by the Chief Justice. I am bound by the majority view, and as I read Flair Builders, it is for the arbitrator to decide whether defendants can still insist on arbitration.

This conclusion presents the difficult question of whether I should dismiss this case or stay it pending arbitration. If I dismiss the case, plaintiff's appellate rights are certain, but if

I stay it, plaintiff may have to go through an arbitration before it can appeal, and the Court of Appeals may hold that I am wrong in saying the disputes should be arbitrated. These factors argue in favor of dismissal.

On the other side of the coin, defendants have already made a 180 degree turn on the arbitrability question, and if I dismiss and plaintiff wants to arbitrate, defendants may make it a 360 degree turn. In this event, plaintiff would have to start all over again. Moreover, there is more than remote chance that the arbitrator will hold that under principles of waiver, repudiation, estoppel or laches, defendants cannot insist on arbitration. Should either of these eventialities come to pass, if the case has been dismissed, plaintiff would have to commence a new lawsuit. Indeed, if there be no limit on the rule of Flair Builders, a recalcitrant party can stall a dispute forever. These factors argue in favor of a stay.

My inclination is to order a stay of this case pending arbitration, but plaintiff is the one burdened with the dilemma stemming from defendants' stalling. Accordingly, I shall and I do order that this case be stayed pending arbitration of the questions, but, if plaintiff would prefer a dismissal to perfect an appellate record, I will probably grant a motion to alter and amend these findings and conclusions in this regard.

Dated at Denver, Colorado, this 19th day of November, 1974.

s/Fred M. Winner
United States District Judge

2. Order Amending Findings And Conclusions (December 27, 1974)

By memorandum opinion of November 19, 1974, I set forth my findings of fact and conclusions of law. They contain an inadvertent error on page 2. The following language should be stricken from page 2:

> "The other two defendants answered, and in paragraph 5 of the amended answer it is said:
>
> > '5. *The above named defendants deny the allegations in paragraph 5 of the Amended Complaint.* By way of further answer, the above named defendants aver that plaintiff and defendant District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreement.... As a consequence, both Defendant Carpenter District Council of Southern Colorado and Defendant Local 1340 would be bound by an arbitral award issued in accordance with the provisions of Article XIII of the collective bargaining agreement.'"

The following should be substituted therefor:
"Plaintiff's complaints (both the original and amended complaint) pleaded that plaintiff and defendants, Carpenters District Council of Southern Colorado and Local 1340 were parties to the collective bargaining agreement. Both the original answer and the amended answer filed by Carpenters District Council of Southern Colorado and Local 1340 denied that Local 1340 was a party to the contract. Defendants did not admit in the pleadings that Local 1340 was subject to the agreement and they did not admit that both defendants would be bound by an arbitrator's decision."

The quotation contained in the original opinion was from defendants' brief submitted with the "Suggestion to Dismiss," and the memorandum opinion erroneously says that the quotation was from paragraph 5 of the amended answer.

On page 10 of the memorandum opinion, I ordered:

> ". . . that this case be stayed pending arbitration of the questions, but, if plaintiff would prefer a dismissal to perfect an appellate record, I will probably grant a motion to alter and amend these findings and conclusions in this regard."

Plaintiff has asked that I do amend the findings and conclusions to order a dismissal of the action rather than a stay. I grant this request, and for the reasons set forth in the memorandum opinion of November 19, 1974,

IT IS ORDERED that judgment enter in favor of defendants and against the plaintiff, and that the action be dismissed.

Dated at Denver, Colorado, this 27th day of December, 1974.

s/Fred W. Winner
United States District Judge

APPENDIX B

TENTH CIRCUIT COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

REID BURTON CONSTRUCTION, INC., a Colorado corporation, Plaintiff-Appellant,	)	
v.	)	No. 75-1149
CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, LOCAL 1340 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL, unincorporated associations and labor organizations, Defendants-Appellees.	)	(C-5184)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Robert G. Good, Denver, Colorado, for Appellant.
John W. McKendree, Denver, Colorado, for Appellees.

Before LEWIS, Chief Judge; SETH and McWILLIAMS, Circuit Judges.

LEWIS, Chief Judge.

Two clearly drawn but different issues are involved in this appeal: (1) Whether Reid Burton Construction's claim for damages arising out of the unions' alleged violation of the no-strike clause was arbitrable, and if so, (2) whether the unions, because of certain pleading and procedural tactics employed by them in the district court, were prevented by the equitable doctrines of waiver, estoppel, repudiation, or laches from asserting the arbitrability of Burton Construction's complaint. Finding both of these issues arbitrable, the district court dismissed the present action.

Since this appeal is not concerned with the merits of the underlying damage claim, we need only outline those facts which led to the filing of this action. Burton Construction, a signatory to a collective bargaining agreement with the Carpenters District Council of Southern Colorado and its affiliated local unions of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, was approached by the Colorado Building and Construtcion Trades Council to sign an agreement whereby it would only subcontract with other employers who were in contractual relationship to labor organizations affiliated with the Building Trades Council. Burton Construction refused to sign the agreement and the Building Trades Council picketed several of Burton Construction's building sites during parts of March and April of 1973.

In spite of a no-strike clause in the collective bargaining agreement, union carpenters refused to cross the picket lines. As a result, on July 13, 1973, Burton Construction filed this damage claim in district court against the Colorado Building and Construction Trades Council, the Carpenters District Council of Southern Colorado, and Local 1340 of the United Brotherhood of Carpenters and Joiners. All three of the defendants made motions to be dismissed from the lawsuit. The

court did dismiss the Building Trades Council, but denied the similar motions of the District Council and Local 1340.

In their answers filed on November 9, 1973, the District Council and Local 1340 admitted jurisdiction under section 301 of the National Labor Relations Act as to the District Council, but asserted that "Local 1340 is not a party to the aforementioned collective bargaining agreement." Also in their answer, as an affirmative defense the District Council and Local 1340 alleged:

> This Court has no jurisdiction over the subject matter of this action because it involves the interpretation and application of the collective bargaining agreement . . . which is within the sole and exclusive province of the dispute resolution machinery contained therein which provisions contain the exclusive remedy for breaches thereof.

The unions also counterclaimed against Burton Construction, Alleging that it had breached the collective bargaining agreement by filing this action for failure to have first used the grievance and arbitration procedures contained in the agreement for processing disputes. In Burton Construction's answer to the counterclaim, it contended that the unions had waived their right to arbitration and that the counterclaim was barred because of laches.

More than a year after the complaint was filed, the unions admitted that while they did not consider Local 1340 to be a "party" to the collective bargaining agreement, they did consider it to be "bound by the substantive terms of the agreement." The case proceeded to a trial on October 1, 1974, wherein the trial court determined that both the alleged violation of the no-strike clause and the issue of whether estoppel,

waiver, repudiation, or laches should prevent the unions from demanding arbitration were arbitrable issues. The trial court based the latter determination on its reading of Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487. The trial court initially intended to order a stay pending the arbitration of these two issues, but noted that if Burton Construction would prefer, the court would dismiss the action in order to perfect the appellate record. Burton Construction opted for the latter and this appeal followed.

I.

The first issue of whether Burton Construction's damage claim for alleged breach of a no-strike clause was an arbitrable issue must be decided by a careful analysis of Drake Bakeries Inc. v. Local 50, Bakery Workers, 370 U.S. 254, and Atkinson v. Sinclair Refining Co., 370 U.S. 238. Both of these cases, which were decided the same day, were damage actions brought by employers against the unions for violations of no-strike or work stoppage provisions in the respective collective bargaining agreements. In each case the unions argued that the issues were arbitrable and that the courts should stay the actions pending arbitration. Basing its opinion on the intended scope and effect of each collective bargaining agreement, the Court reached different results.

The fact that the Supreme Court reached different conclusions in Atkinson and Drake Bakeries is consistent with its earlier observation in Warrier & Gulf Navigation where it stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582. Our first question therefore is one of contractual interpretation—whether a viola-

tion of the no-strike clause was intended by Burton Construction and the Unions to be subject to Article XIII, the grievance and arbitration provisions of the collective bargaining agreement.

Neither Drake Bakeries nor Atkinson definitively answers our question, since the language of Article XIII falls somewhere in between the pertinent grievance and arbitration provisions in those cases. In Atkinson, the Court found it persuasive that the grievance and arbitration clause applied only to employee-initiated grievances and was not intended to include "all of their possible disputes."[1] The applicable grievance provision in Drake Bakeries, however, was much more broadly written—it was to include "all complaints, disputes, or grievances arising between [the parties]"—and clearly indicated that either labor or management could process a grievance.[2] The standard of analysis used by the Court apparently

---

[1]The procedure for filing a grievance under the collective bargaining agreement in Atkinson clearly applied only to the employee- and/or union-initiated grievances:

> It is the sincere desire of both parties that *employee grievances* be settled as fairly and as quickly as possible. Therefore, when a grievance arises, the following procedure must be followed:
>
> 2. For the purpose of adjusting *employee grievances and disputes* as defined above, it is agreed that *any employee, individually or accompanied by his committeeman,* if desired shall:
>
> (a) Seek direct adjustment of any grievance or dispute with the foreman under whom he is employed. . .
>
> (b) If the question is not then settled the employee may submit his grievance in writing, on forms supplied by Union. . . .

Quoted in Atkinson v. Sinclair Refining Co., 370 U.S. 238, 250 (Emphasis added)

[2]Unlike the language in Atkinson, the grievance procedure in Drake Bakeries unequivocally was designed to allow either the employee or the employer to initiate grievance procedures:

> (a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involv-

fixes on two factors: (1) Whether the grievance and arbitration provisions were wholly employee and union initated or could be initiated by either the employees or the employer, and (2) whether disputes over the violation of no-strike clauses were intended by the parties to be subject to grievance and arbitration procedures.

Each of the cases that has ruled that a violation of a no-strike clause is not subject to arbitration has done so when the grievance and arbitration provisions were wholly employee and union initiated.[3] Burton Construction contends that Article XIII is wholly employee initiated, citing the following language:

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ing questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

In the *adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management.* It is agreed that in the handling of grievances there shall be no intereference with the conduct of the business.

(b) If the Committee and the Shop Management are unable to effect an adjustment, then the *issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party.* The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, *then either party shall have the right to refer the matter to arbitration as herein provided.*

Quoted in Drake Bakeries Inc. v. Local 50, Bakery Workers, 370 U.S. 254, 257 n.2. (Emphasis added)

[3]See, e.g., Friedrich v. Local 780, IUE, 5 Cir., 515 F_2 255; Faultless Division v. Local 2040, I.M. & A.W., 7 Cir., 513 F_2 987,, 990; Affiliated Food Distributors, Inc. v. Local 229, Teamsters, 3 Cir., 483 F_2 418, cert. denied, 415 U.S. 916; Firestone Tire & Rubber Co. v. Rubber Workers Union, 5 Cir., 476 F_2 603, 605-06; G.T. Schjeldahl Co. v. Local 1680, Machinists, 1 Cir., 393 F_2 502; Boeing Co. v. UAW Local 1069, 3 Cir., 370 F_2 969.

> In the event that a dispute arises involving the application or interpretation of the terms of this agreement, reasonable and diligent effort shall be exerted by the employee with the employer's representative, the employee contacting the business representative through the steward, and/or the business representative with the employer's representative[.]

We find this language ambiguous as to whether an employer can initiate a grievance, but in the context of the sentence immediately following the quoted language, it becomes apparent that the parties intended that either party could process a grievance:

> If the two parties are unable to reach a settlement, the dispute shall be reduced to writing and *the aggrieved party* shall notify *the other party* the dispute is being referred to a Board of Adjustment.

(Emphasis added.) Reference to the parties as "the aggrieved party" and "the other party" is, as was the case in Drake Bakeries, indicative that under the agreement either party could initiate the grievance procedure.

The second prong of the Atkinson-Drake Bakeries analysis is one of contractual interpretation—whether the language of Article XIII is broad enough to include alleged violations of the no-strike clause. Article XIII provisions were intended to cover any "dispute . . . involving the application or interpretation of the terms of th[e] agreement." This language is much more analogous to the language in Drake Bakeries, which the Court determined was broad enough to cover a violation of a no-strike clause, than to the corresponding provision in Atkin-

son.[4] The similarity between Article XIII and the language in Drake Bakeries together with the Warrior & Gulf presumption of arbitrability—that disputes should be arbitrated "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"—convinces us that the district court correctly concluded that under this collective bargaining agreement, the alleged violation of the no-strike clause was an arbitrable issue.

II.

In its trial memorandum, Burton Construction raised the issue of whether the unions were estopped from claiming any right of arbitration on the basis of certain equitable principles (e.g., repudiation, laches, waiver) because of their dilatory pleading practices before the district court. Before confronting this issue, however, the district court had to determine whether judicial proceedings or arbitration was the proper forum for determining the merits of the equitable defenses raised by Burton Construction. Reluctantly, the district court answered that equitable defenses should also be decided by arbitration as mandated by Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487. We cannot agree with the district court's conclusion that in every instance where the parties of a section 301 action are bound by a collective bargaining agreement Flair Builders requires questions of waiver, repudiation, estoppel, laches or other equitable defenses to be determined by an arbitrator. We deem this broad conclusion to be subject to an important limitation.

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[4]The parties in Drake Bakeries had agreed to attempt adjustment of "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by" the agreement, whereas in Atkinson, the grievance procedure only applied to "any difference regarding wages, hours or working conditions. . . ."

The issue in Flair Builders was whether a party to a collective bargaining agreement may be so dilatory in making the existence of a "vaguely delineated dispute" known to the other party that a court is justified in refusing to compel the submission of an otherwise arbitrable issue to an arbitrator. The Supreme Court did not directly answer this question, but instead ruled that the arbitration clause in that case was so broadly worded as to include also the arbitration of the laches issue. The Court, noting that its decision did not excuse a judicial examination of the scope of an arbitration clause as to whether equitable defenses should be decided by the arbitrator or the court, concluded that

> once a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to "any difference" between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement.

Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487, 491-92. Thus, Flair Builders did not determine that every equitable defense was an arbitrable issue, but that its arbitrability hinged upon the scope of the arbitration clause.

The equitable defense in the instant case arose from alleged "evasive" and "dilatory" pleading tactics by the unions in the district court proceedings, specifically the fact that the unions claimed that Local 1340 was not a party to the collective bargaining agreement, later admitting that while Local 1340 was not a party it was still bound by the provisions of the agreement. Courts must, of course, maintain judicial control of their own proceedings. Such power, we assert, is broad enough to include a court's determination of the validity of equitable defenses arising out of the action of parties before

the court. To hold otherwise would unnecessarily hamper a court's control of its proceedings.

We do not read Flair Builders nor its progeny as requiring a district court to flatly forego the exercise of its traditional powers in favor of arbitration in determining the merits of alleged equitable defenses. After analyzing and reviewing Flair Builders and the subsequent cases citing it, we conclude that Flair Builders can be confined to the proposition that certain broadly-worded arbitration clauses require the arbitration of equitable defenses arising out of the formation of a collective bargaining agreement or the processing of a grievance,[5] be they intrinsic procedural questions or extrinsic questions as defined by John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543.[6] This is not an unduly narrow reading of Flair Builders. Surely, no one would contend that an express waiver of a party's right to demand arbitration during the course of a case in district

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[5]See, e.g., H & M Cake Box, Inc. v. Bakery Workers Local 45, 1 Cir.,, 493 F_2 1226, cert. denied, 419 U.S. 839; General Dynamics Corp. v. Local 5, Marine and Shipbuilding Workers, 1 Cir., 469 F_2 848; Operating Engineers Local 139 v. Carl A. Morse, Inc., E.D. Wis., 387 F. Supp. 153; Local 552, Brick and Clay Workers v. Hydraulic Press Brick Co.., S.D. Mo., 371 F. Supp. 818. But see Ladies' Garment Workers' Union v. Ashland Industries, Inc., 5 Cir., 488 F_2 641, cert. denied, 419 U.S. 840.

[6]Two cases citing Flair Builders, however, have called for the arbitration of equitable defenses not arising out of the processing of a grievance or the formation of a collective bargaining agreement. Controlled Sanitation Corp. v. District 28, I.M. & A.W., 3 Cir., 524 F_2 1324, cert. denied, 44 U.S.L.W. 3471; Local 542, Operating Engineers v. Penn State Construction, Inc., M.D. Pa., 356 F. Supp. 512. In each of these section 301 actions, the defendants alleged arbitrability of the underlying dispute. Because of certain pleading delays on the part of the defendants, the plaintiffs in each case countered the arbitrability claim, asserting that the defendants had waived or repudiated their right to arbitrate the dispute. As was the case with the district court in this instance, the courts held that Flair Builders mandated the arbitration of the waiver and repudiation defenses, but neither court focused on what we have determind to be a crucial distinction—a court's inherent and unrestricted power to control the judicial functions.

court would not be adequate legal grounds for the disttict court to proceed to the merits of an otherwise arbitrable dispute without requiring arbitration.

The test employed by the Supreme Court in Flair Builders to determine the arbitrability of the laches issue was whether the parties had, by the language of the collective bargaining agreement, intended that such a dispute be arbitrable. Following this test, we must determine whether Burton Construction and the unions agreed to arbitrate any questions of equitable defenses arising out of misconduct in court cases in which the two were parties. As discussed earlier, the language of Article XIII was broad enough to include disputes dealing with violations of the no-strike provision and would probable cover the type of laches defense raised in Flair Builders, but we do not believe that the parties ever intended to include the arbitration of equitable defenses arising out of actions by a party in proceedings before a district court. Indeed, even had the parties so intended, we would conclude that such an agreement would clearly exceed the proper subject matter of a collective bargaining agreement and would not be enforceable in court; it would be improper for the prospective parties of a lawsuit to attempt by contract to bind the exercise of a court's inherent judicial function.

Allowing federal courts to retain jurisdiction under section 301 of the National Labor Relations Act of an otherwise arbitrable dispute because of certain misconduct of one of the parties in the judicial proceedings themselves which gives rise to some type of estoppel to claim arbitrability is not inconsistent with the strong national labor policy favoring arbitration of labor disputes. As noted earlier, this policy is partly premised on the understanding that

> arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . . An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83. If it can be concluded with "positive assurance" that the parties did not intend to arbitrate certain disputes, the policy favoring arbitration does not come into play. As discussed above, the parties in this case neither intended nor had the power to require arbitration of certain equitable defenses that have traditionally been decided exclusively by the courts.

In conclusion ,therefore, we hold that the trial court erred in ruling that it was "bound" by Flair Builders to submit to arbitration the question of whether the unions should be prevented from demanding arbitration because of "evasive" and "dilatory" pleading practices before the court. It is entirely appropriate in some instances for a district court to retain section 301 jurisdiction of an arbitrable dispute where, because of conduct before the court, it may be deemed that a party is prevented on the basis of some equitable principle from asserting a right to arbitration. Whether the instant case is one such instance has not been decided. Therefore, we remand this case for such a determination. If the district court finds that there has been no estoppel or waiver because of the unions' conduct in pleading, then it is proper to order arbitration of the underlying dispute—the alleged violation of the no-strike clause. If on the other hand it is determined that the unions have waived their right to arbitration, or in some other way should be prevented from asserting this right, because of

conduct which falls within the control of the court, then the district court can properly proceed to the merits of the underlying dispute.

In sum we conclude that the enumerated equitable defenses discussed are, in general, mandated by Flair Builders to the arbitrator for determination of the continued vitality of the contractual arbitration process. However, if such defenses arise solely during the course of the judicial process the arbitrator is not the one to determine whether the judicial process has been abused by either party or at all or whether an equitable defense to the main dispute has been established during the course of the judicial trial by in-trial conduct.

Remanded.

APPENDIX C

SELECTED PLEADINGS*

1. Respondent's Complaint for Damages and Injunction (July 13, 1973)

COMES NOW the Plaintiff, Reid Burton Construction, Inc., by its attorneys, Law Offices of Robert G. Good, Denver, Colorado, and for a cause of action against Defendants alleges and states as follows:

1. Plaintiff is a corporation organized under and existing by virtue of the laws of the State of Colorado, with principle office and place of business at Fort Collins, Colorado.

2. Defendants, and each of them, are labor organizations within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq. Defendant Local 1340 has its principle office at Fort Collins, Colorado, Defendant Carpenters District Council of Southern Colorado has its principle office at Colorado Springs, Colorado, and Defendant Colorado Building and Construction Trades Council has its principle office at Denver, Colorado.

3. Defendants, and each of them, represent employees in an industry affecting commerce and Plaintiff is an employer

*This appendix includes those pleadings, or portions thereof, which the Petitioners believe relevant to determination of the within Petition. In some instances only a portion of a pleading has been reproduced because of the length of such pleading and because of the immateriality of the deleted portions to any issue herein. Party captions have been deleted for economy of space, as have signatures and certificates of service. Following the caption of each pleading is that date on which it was filed with the District Court.

in an industry affecting commerce, as that term is defined in the National Labor Relations Act, 29 U.S.C. § 152.

4. Jurisdiction over this action is granted the Court by the provisions of 29 U.S.C. §185.

5. Plaintiff and Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, AFL-CIO, are parties to a collective bargaining agreement known as "Carpenters' Agreement, Carpenters District Council of Southern Colorado." At all times material herein such collective bargaining agreement was in full force and effect and governed the relationship between the aforementioned parties.

6. Said collective bargaining agreement contains promises by Local 1340 and by the Carpenters District Council of Southern Colorado that they and their members will not strike or picket the Plaintiff during the term of the agreement. Said collective bargaining agreement further defines the relationship of the Plaintiff to Plaintiff's contractors or subcontractors on construction sites in so far as all the requirements, conditions and intents of the said collective bargaining agreement applies to said contractors or subcontractors of Plaintiff.

7. Defendant, Colorado Building and Construction Trades Council, is an unincorporated association and an amalgamation of numerous labor organizations in the building and construction industry in the State of Colorado, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado. Defendant Colorado Building and Construction Trades Council is authorized by its constituent unions, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, to represent

them for purposes relating to labor relations, and as such the Defendant Colorado Building and Construction Trades Council is an agent of its constituent unions.

8. On or about February 25, 1973, a representative of Defendant Colorado Building and Construction Trades Council, submitted to Plaintiff herein for its requested signature a labor agreement which would require, inter alia, that Plaintiff contract only with union subcontractors in the future on all its construction sites, which union subcontractors must have signed union agreements with the various construction trades, including subcontractors performing carpenter work.

9. When Plaintiff refused to sign the labor agreement described above in paragraph eight, Defendant Colorado Building and Construction Trades Council commenced picketing a Fort Collins construction site of Plaintiff on or about March 8, 1973 and continued to do so until on or about March 16, 1973. On or about April 3, 1973, and continuing to on or about April 13, 1973, such picketing was resumed by Defendant Colorado Building and Construction Trades Council where the object thereof was to force Plaintiff to sign the submitted labor agreement.

10. The picketing described above in paragraph nine was implicity and/or expressly authorized by and/or ratified by the constituent labor organizations which are members of the Colorado Building and Construction Trades Council, including Defendants Local 1340 and Defendant Carpenters District Council of Southern Colorado, and at all times Defendant Colorado Building and Construction Trades Council was acting within the scope of its authority from its members.

11. During the period of the picketing described above

in paragraph nine, Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, by its representatives, induced, encouraged or coerced its employee members to cease performing work for Plaintiff on the subject construction site and otherwise endorsed, enforced and supported the picket of Defendant Colorado Building and Construction Trades Council.

12. The picketing of Defendant Colorado Building and Construction Trades Council, as described above in paragraph nine, resulted in Plaintiff's construction site being temporarily shut down in whole or in part during the period of said picketing, thus subjecting Plaintiff to monetary losses in the approximate amount of $1,000.00 per day, which amount cannot be definitely ascertained at this time, but will be at the time of trial of this cause.

13. The labor agreement submitted for signature by Defendant Colorado Building and Construction Trades Council, as agent for Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, among others, would require Plaintiff to conduct his business at its construction sites relative to labor relations in a manner that is not required under its existing agreement with Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado. By the action of the Defendant Colorado Building and Construction Trades Council as agent for Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, the two aforementioned Carpenter Defendants are attempting to change the provisions of their existing collective bargaining agreement and thus have violated the terms of that agreement and have caused Plaintiff damages in their attempt to make such change.

14. The action of Defendant Local 1340 and Defendant

Carpenters District Council of Southern Colorado in endorsing and supporting the picket line established by its agent, Defendant Colorado Building and Construction Trades Council, and the action of the two Carpenter Defendants aforementioned in inducing and encouraging and/or coercing its members to refuse to work for Plaintiff, also constitutes a breach of their contract promises not to strike or picket Plaintiff during the term of their collective bargaining agreement. By such action, the two Carpenter Defendants further contributed to the damages suffered by Plaintiff as described above.

15. Defendant Colorado Building and Construction Trades Council, by its representatives, continues to request Plaintiff to sign its labor agreement as described above, and continues to threaten to picket Plaintiff as done previously where the object thereof is to force Plaintiff to sign said agreement and it can be reasonably anticipated that unless enjoined, Defendant Colorado Building and Construction Trades Council, as agent for the two Carpenter Defendants herein, will continue to do so.

WHEREFORE, Plaintiff prays this Honorable Court to enter judgment in favor of Plaintiff against all Defendants jointly and severally, in the approximate amount of $16,000.00 to compensate Plaintiff for its monetary losses during said picketing, such amount to be more definitely ascertained at the time of trial of this action. The Court is further requested to enter an order forever restraining Defendant Colorado Building and Construction Trades Council, as agent for the two Carpenter Defendants herein, from picketing Plaintiff where the object thereof is to force or require Plaintiff to sign the aforementioned labor agreement; the Court is further requested to restrain Defendant Local 1340 and Defendent Carpenters District Council of Southern Colorado from authoriz-

ing the Defendant Building Trades Council to picket Plaintiff or to solicit Plaintiff's signature on the subject labor agreement, and from supporting and endorsing the picket line of Defendant Building Trades Council and from inducing, encouraging and/or coercing their members to respect the picket line of said Building Trades Council.

FURTHER, this Court is urged to award Plaintiff reasonable attorney's fees, costs, interest, and such other and further relief as this Court may deem proper.

2. Colorado Building and Construction Trades Council's Motion to Dismiss (August 6, 1973)

COMES NOW the defendant Colorado Building and Construction Trades Council, by and through its attorneys Hornbein & Hornbein, and moves this Honorable Court to enter an Order dismissing plaintiff's Complaint;

AND AS GROUNDS THEREFORE defendant Colorado Building and Construction Trades Council shows unto this Honorable Court:

1. That this Honorable Court lacks jurisdiction over the subject matter of plaintiff's Complaint;

2. That plaintiff has failed to join parties necessary and indispensable under Fed R. Civ. P. 19;

3. That plaintiff's Complaint fails to state a claim upon which relief can be granted.

3. Petitioners' Motion to Dismiss (August 6, 1973)

COME NOW the defendants, Carpenters District Council of Southern Colorado and Local No. 1340 of the International Brotherhood of Carpenters and Joiners of America, AFL-CIO by and through their attorneys, Hemminger, McKendree, Vamos & Elliott, P.C. and move this Honorable Court to enter an Order dismissing plaintiff's Complaint,

AND AS GROUNDS THEREFORE defendants Carpenters District Council of Southern Colorado, Local No. 1340 of the International Brotherhood of Carpenters and Joiners of America, AFL-CIO show unto this Honorable Court:

1. That this Honorable Court lacks jurisdiction over the subject matter of plaintiff's Complaint;

2. That plaintiff has failed to join parties necessary and indispensable under Fed R. Civ. P. 19;

3. That plaintiff's Complaint fails to state a claim upon which relief can be granted.

4. Excerpts from Petitioners' and Colorado Building and Construction Trades Council's Brief in Support of Motions to Dismiss (August 20, 1973)

> IV. THE COURT LACKS JURISDICTION OF THE SUBJECT MATTER OF PLAINTIFF'S COMPLAINT, AND THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BY VIRTUE OF THE NORRIS-LAGUARDIA ACT, 47 STAT. 70, 29 U.S.C. §101 - 115.

A careful analysis of the Complaint reveals that plaintiff is actually asking this Honorable Court to enjoin the Building Trades Council from picketing with an objective to force or

require plaintiff to sign an agreement with defendant Building Trades Council. As regards defendants District Council and Local 1340, plaintiff seeks an order from this Honorable Court directed to such defendants directing them not to authorize defendant Trades Council to picket plaintiff or to solicit plaintiff's signature on a labor agreement and further, to restrain defendants District Council and Local 1340 from supporting such picket as may be established by defendant Trades Council or from inducing, encouraging and/or coercing their members to respect picket lines allegedly established by defendant Trades Council.

As demonstrated herein, this court lacks jurisdiction to order the relief requested in plaintiff's Complaint. The Norris-LaGuardia Act forbids the exercise of injunctive powers by Federal Courts in cases involving or growing out of a labor dispute. The interdictions of the Norris-LaGuardia Act has not been limited or repealed either expressly or impliedly by §301(a) or the Labor Management Relations Act of 1947, as amended. In addition, the Complaint on its face fails to state a claim upon which injunctive relief can be granted in this case, since the Norris-LaGuardia Act prescribes rigid requirements which must be met before the strictly limited exceptions of the statute may be applied in granting jurisdiction to the Court. In addition, the Complaint wholly fails to allege any conduct on the part of any of the defendants herein in the nature of which the Court might find as being unlawful within the meaning of §7 or any other provision of Norris-LaGuardia. Inasmuch as the applicable law is somewhat different with respect to defendant Building Trades Council as opposed to defendants Local Union 1340 and the District Council, the applicable legal requirements are discussed separately for these defendants. Preliminarily, however, certain

general legal principals are applicable for both and are initially described herein.

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In view of the recent decision of the United States Supreme Court in Boy's Market, Inc., v. Retail Clerks, 398 U.S. 235, 75 LRRM 2257 (1970), it is appropriate to examine the scope of that decision at some length at it relates particularly to the allegations in plaintiff's Complaint herein that the alleged agreement with defendant Local 1340 and defendant District Council contains a promise that such organization will not strike or picket plaintiff.

In the Boy's Market decision the Supreme Court reexamined its holding in Sinclair Refining Company v. Atkinson, 370 U.S. 195, 50 LRRM 2420 (1962) to the effect that the anti-injunction provisions of the Norris-LaGuardia Act preclude a Federal Court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement even though that agreement contains provisions enforceable under §301(a) of the Labor Management Relations Act for binding arbitration of the grievance dispute concerning which the strike was called.

Briefly stated, the facts involved in Boy's Market are as follows: the parties had a collective bargaining agreement which contained a provision for adjustment of disputes and arbitration which arose during the life of the agreement and a no-strike provision. The dispute giving rise to the litigation arose when a company supervisor and certain members of his crew were not members of the bargaining unit described in the collective bargaining agreement began to perform certain bargaining unit work. A union representative insisted that all the work should be re-done by union personnel. When the

company did not accede to this demand of the union a strike was called and the union began to picket the company's establishment. Thereupon, the company demanded that the union cease the work stoppage and picketing and sought to invoke the grievance and arbitration procedures specified in the agreement. When the strike was not terminated pursuant to such demand a civil action was instituted in the state courts which resulted in the issuance of a temporary restraining order. Thereafter the union removed the case to the Federal District Court and moved to quash the state's temporary restraining order. The company countered by moving for an order compelling arbitration and enjoined continuation of the strike. The United States District Court thereafter concluded that the dispute was subject to arbitration under the collective bargaining agreement, that the strike was in violation of the agreement, and the Court ordered the parties to arbitrate and simultaneously enjoined the strike and all picketing.

The United States Supreme Court initially determined that the doctrine of stare decisis does not bar a re-examination of its earlier decision in Sinclair v. Atkinson. The majority's decision opined that because Sinclair stood as a significant departure from its otherwise consistent emphasis upon a Congressional policy to promote peaceful settlement of labor disputes through arbitration and its efforts to accomodate and harmonize this policy with those underlying the anti-injunction provisions of the Norris-LaGuardia Act, that Sinclair had to be reconsidered. The court went on to state that in view of the developments since Sinclair, including its own decision of Avco Corp. v. Aero Lodge 735, 390 U.S. 557, 67 LRRM 2881 (1968) its earlier Sinclair decision had resulted in a serious frustration of important goals in the nation's labor policies. The U.S. Supreme Court went on to then review its decisions interpreting a Federal Labor policy promoting peaceful settlement of

labor disputes through arbitration by concluding that the Norris-LaGuardia Act did not deprive Federal Courts of jurisdiction to mandate parties to utilize the contractual grievance and arbitration machinery. In this connection the Court examined its decisions in Textile Workers Union v. Lincoln Mills, supra., Charles Dowd Box Co. v. Courtney, Supra., Teamsters Local 174 v. Lucas Flour Co., Supra., and Avco Corp. v. Aero Lodge 735, Supra. Thereafter the Supreme Court stated:

> "IV. We have also determined that the dissenting opinion in Sinclair states the collect principals concerning the accommodation necessary between the seemingly absolute terms of the Norris-LaGuardia Act and the policy considerations underlying §301(a)."
>
> 370 U.S., et 215.

Although we need not repeat all that was there said, a few points should be emphasized at this time:

> "The literal terms of §4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of §301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies which inspired ostensible inconsistent provisions. (Citations omitted).
>
> The Norris-LaGuardia Act was responsive to a situation totally different from that which exists today...."
>
> "In 1932 Congress attempted to bring some order out of the industrial chaos that had developed and to correct the abuses which had resulted from the interjection of the fed-

eral judiciary into union-management disputes on the behalf of management. See declaration of public policy, Norris-LaGuardia Act, §2, 47 Stat. 70 (1932). Congress, therefore, determined initially to limit severely the power of the Federal Courts to issue injunctions 'in any case involving or growing out of any labor dispute. . . .' 47 Stat. 70. Even as initially enacted, however, the prohibition against Federal injunction was by no means absolute. See Norris-LaGuardia Act, §§7, 8, 9, 47 Stat. 70 (1932). Shortly thereafter, Congress passed the Wagner Act, designed to curb various management activities which tended to discourage employee participation in collective action.

As labor organizations grew in strength and developed towards maturity, Congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. Thus, it became the tasks of the court to accommodate, to reconcile the older statutes with the more recent ones."

• • •

". . . we conclude therefore, that the unavailability of equitable relief in the *arbitration context* presents a serious impediment to Congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the whole purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and

consequently, that the Norris-LaGuardia Act does not bar the granting of injunctive relief in the instant case."
74 LRRM at 2262-2264.

The United States Supreme Court in this decision, however, did not find the Norris-LaGuardia Act unconstitutional and sweep it away, but, on the contrary, reached a very narrow decision with respect to the application of the Norris-LaGuardia Act on Federal Court jurisdiction. Specifically, the Supreme Court stated, "we do not undermine the vitality of the Norris-LaGuardia Act." The Court stated, "we deal only with the situation in which a collective bargaining contract contains a mandatory grievance or arbitration procedure." The Court went on to state:

"... nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike *over an arbitrable grievance.* The dissenting opinion in Sinclair suggests the following principles for the guidance of the District Courts in determining whether to grant injunctive reliem – *principles which we now adopt:*

'A District Court entertaining an action under §301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that affect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike.

> Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity – whether breaches are occurring and will continue, or have been threatened and will be commited; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injuction that will the union from its issuance.' 370 U.S. at 228. . ." See 74 LRRM at 2264; (emphasis supplied).

As a consequence, the Supreme Court in its Boy's Market decision determined that in that particular case there was no dispute, that the grievance in question was not only the reason for the strike and picketing, but was also a dispute which was subject to adjustment and arbitration under the collective bargaining agreement, and that the company was ready to proceed with arbitration at the time the injunction against the strike was sought and obtained. In addition the Supreme Court noted the conclusion by the District Court that the alleged violation of the no-strike obligation resulted in the employer suffering irreparable injury and the fact that the company would continue to suffer irreparable injury unless the strike was enjoined. For those reasons the Supreme Court then overruled Sinclair and the Court of Appeals, who had relied on the Supreme Court's decision in Sinclair.[2] As one examines this decision in light of the allegations contained in plaintiff's Complaint, several deficiencies in plaintiff's Complaint emerge. For example, plaintiff does not allege that it will suffer irreparable harm and that it will continue to suffer such irreparable harm and injury unless the court enters the restraining order requested. Courts ought not to lightly infer jurisdiction, particularly when complaints which seek jurisdiction are de-

[2]Justice Stewart concurred and Justices Black and White dissented.

fective in their pleadings. But more importantly, not only does plaintiff's Complaint fail to allege the existence of a grievance and arbitration machinery, it even fails to allege that the dispute or alleged dispute upon which it seeks injunctive relief is a dispute which is also subject to the grievance and arbitration machinery of the collective bargaining agreement. In this connection, the United States Court of Appeals for the 5th Circuit in its Amstar Corp. v. Meatcutters decision, _____ F.2d _____ 81 LRRM 2644 (1972) held that the district court erred when it granted an employer an order enjoining a strike, and compelling arbitration of a dispute involving the refusal of union members to cross the picket line established by another union because the strike was not over a grievance which was subject to the arbitration provisions of the collective bargaining agreement involved. The 5th Circuit in reaching this decision concluded that the United States Supreme Court, in an attempt to accommodate the literal terms of §4 of the Norris-LaGuardia Act to the subsequently enacted provisions of §301(a) of the Taft-Hartley Act established prerequisites to jurisdiction in a Federal Court before it can enjoin a strike. These criteria are (1) the strike must be in breach of a no-strike obligation under an effective collective bargaining agreement. (2) The strike must be "over" an arbitrable grievance. And, (3) both parties must be contractually bound to arbitrate the underlying grievance which caused the strike. As regards the allegations in the instant Complaint, plaintiff has failed to allege any of these criteria. Also see Paradise Publications, Inc. v. Philadelphia Mailers Union, Local No. 13, 3rd Cir., 459 F. 2d 369 (80 LRRM 2264) (1972).

Regarding plaintiff's allegations against defendant Building Trades Council, however, no allegations have been made, as required under Norris-LaGuardia, in order to provide unto this Court jurisdiction to enter an order seeking injunctive relief, as discussed in greater detail infra.

The United States District Court for the District of Maryland has followed a similar rationale in its decision General Cable Corp. v. I.B.E.W. Local 1644, 331 F.Supp. 478, 77 LRRM 3053 (1971). In this case the United States District Court ruled that it did not have jurisdiction to issue an injunction against a union that engaged in strike activity allegedly in violation of a no-strike clause of a collective bargaining agreement where the strike was not over a grievance which was subject to arbitration under such agreement. In its decision, the District Court opined:

> ". . . in the present case the strike or work stoppage is not over a grievance which is subject to arbitration under the collective bargaining agreement. (Citations ommited). The only dispute between the company and Local 1644 is the result of the strike and not the cause of the strike. It does not come within the narrow exception created by the rule in Boy's Market to the applicability of the Norris-LaGuardia Act."

Here again, plaintiff's Complaint fails to meet even any allegation that the alleged activities of any of the defendants upon which alleged picketing occurred concerns itself with a grievance which is subject to arbitration under the contract.

5. Respondent's Amended Complaint (September 14, 1973)

COMES NOW the Plaintiff, Reid Burton Construction Inc., by its attorneys, Law Offices of Robert G. Good, Denver, Colorado, and for a cause of action against Defendants alleges and states as follows:

1. Plaintiff is a corporation organized under and existing

by virtue of the laws of the State of Colorado, with principle office and place of business at Fort Collins, Colorado.

2. Defendants, and each of them, are labor organizations within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq. Defendant Local 1340 has its principle office at Fort Collins, Colorado, Defendant Carpenters District Council of Southern Colorado has its principle office at Colorado Springs, Colorado, and Defendant Colorado Building and Construction Trades Council has its principle office at Denver, Colorado.

3. Defendants, and each of them, represent employees in an industry affecting commerce and Plaintiff is an employer in an industry affecting commerce, as that term is defined in the National Labor Relations Act, 29, U.S.C. §152.

4. Jurisdiction over this action is granted the Court by the provisions of 29 U.S.C. §185.

5. Plaintiff and Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, AFL-CIO, are parties to a collective bargaining agreement known as "Carpenters' Agreement, Carpenters District Council of Southern Colorado." At all times material herein such collective bargaining agreement was in full force and effect and governed the relationship between the aforementioned parties.

6. Said collective bargaining agreement contains promises by Local 1340 and by the Carpenters District Council of Southern Colorado and they and their members will not strike or picket the Plaintiff during the term of the agreement. Said collective bargaining agreement further defines the relation-

ship of the Plaintiff to Plaintiff's contractors or subcontractors on construction sites in so far as all the requirements, conditions and intents of the said collective bargaining agreement applies to said contractors or subcontractors of Plaintiff.

7. Defendant, Colorado Building and Construction Trades Council, is an unincorporated association and an amalgamation of numerous labor organizations in the building and construction industry in the State of Colorado, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado. Defendant Colorado Building and Construction Trades Council is authorized by its constituent unions, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, to represent them for purposes relating to labor relations, and as such the Defendant Colorado Building and Construction Trades Council is an agent of its constituent unions.

8. On or about February 25, 1973, a representative of Defendant Colorado Building and Construction Trades Council submitted to Plaintiff herein for its requested signature a labor agreement which would require, inter alia, that Plaintiff contract only with union subcontractors in the future on all its construction sites, which union subcontractors must have signed union agreements with the various construction trades, including subcontractors performing carpenter work.

9. When Plaintiff refused to sign the labor agreement described above, in paragraph eight, Defendant Colorado Building and Construction Trades Council commenced picketing a Fort Collins construction site of Plaintiff on or about March 8, 1973 and continued to do so until on or about March 16, 1973. On or about April 3, 1973, and continuing to on or about April 13, 1973, such picketing was resumed by Defendant Colorado

Building and Construction Trades Council where the object thereof was to force Plaintiff to sign the submitted labor agreement.

10. The picketing described above in paragraph nine was implicitly and/or expressly authorized by and/or ratified by the constituent labor organizations which are members of the Colorado Building and Construction Trades Council, including Defendants Local 1340 and Defendant Carpenters District Council of Southern Colorado, and at all times Defendant Colorado Building and Construction Trades Council was acting within the scope of its authority from its members.

11. During the period of the picketing described above in paragraph nine, Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, by its representatives, induced, encouraged or coerced its employee members to cease performing work for Plaintiff on the subject construction site and otherwise endorsed, enforced and supported the picket of Defendant Colorado Building and Construction Trades Council.

12. The picketing of Defendant Colorado Building and Construction Trades Council, as described above in paragraph nine, resulted in Plaintiff's construction site being temporarily shut down in whole or in part during the period of said picketing, thus subjecting Plaintiff to monetary losses in the approximate amount of $1,000.00 per day, which amount cannot be definiately ascertained at this time, but will be at the time of trial of this cause.

13. The labor agreement submitted for signature by Defendant Colorado Building and Construction Trades Council, as agent for Defendant Local 1340 and Defendant Carpenters

District Council of Southern Colorado, among others, would require Plaintiff to conduct his business at its construction sites relative to labor relations in a manner that is not required under its existing agreement with Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado. By the action of the Defendant Colorado Building and Construction Trades Council as agent for Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, the two aforementiosed Carpenter Defendants are attempting to change the provisions of their existing collective bargaining agreement and thus have violated the terms of that agreement and have caused Plaintiff damages in their attempt to make such change.

14. The action of Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado in endorsing and supporting the picket line established by its agent, Defendant Colorado Building and Construction Trades Council, and the action of the two Carpenter Defendants aforementioned in inducing and encouraging and/or coercing its members to refuse to work for Plaintiff, also constitutes a breach of their contract promises not to strike or picket Plaintiff during the term of their collective bargaining agreement. By such action, the two Carpenter Defendants further contributed to the damages suffered by Plaintiff as described above.

WHEREFORE, Plaintiff prays this Honorable Court to enter judgment in favor of Plaintiff against all Defendants jointly and severally, in the approximate amount of $16,000.00 to compensate Plaintiff for its monetary losses during said picketing, such amount to be more definitely ascertained at the time of trial of this action.

FURTHER, this Court is urged to award Plaintiff reason-

able attorney's fees, costs, interest, and such other and further relief as this Court may deem proper.

6. Petitioners' Answer and Counterclaim (November 9, 1973)

ANSWER

COMES NOW the defendants, Carpenters District Council of Southern Colorado and Local 1340 of International Brotherhood of Carpenters and Joiners of America, by their attorneys, Hemminger, McKendree, Vamos & Elliott, P.C., and file the within Answer and Counterclaim to the Amended Complaint in this matter as follows:

1. Defendants Carpenters District Council of Southern Colorado and Local 1340 of International Brotherhood of Carpenters and Joiners of America admit the allegations contained in paragraph 1 of the Amended Complaint.

2, 3. Defendants above-named admit the allegations contained in paragraph 2 and 3 of the Amended Complaint, except to the extent that said allegations relate to the defendant Colorado Building and Construction Trades Council.

4. Defendants above named admit in part and deny in part the allegations contained in paragraph 4 of the Amended Complaint; admitted as to defendant Carpenters District Council of Southern Colorado and denied as to defendant Local 1340 and defendant Colorado Building and Construction Trades Council.

5. The above named defendants deny the allegations contained in paragraph 5 of the Amended Complaint. By way of

further answer, the above named defendants aver that plaintiff and defendant Carpenters District Council of Southern Colorado are parties to a collective bargaining agreement known as "Carpenters Building Construction 1972-75 Agreement" effective May 1, 1973 until April 30, 1975. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement.

6. Defendant Local 1340 denies the allegations contained in paragraph 6 of the Amended Complaint. Defendant Carpenters District Council of Southern Colorado denies as stated the allegations contained in paragraph 6 of the Amended Complaint. By way of further answer the defendant Carpenters District Council of Southern Colorado avers that the aforementioned collective bargaining agreement contains in Article XIII the following provision pertinent to strikes, work stoppages, etc.:

> "Section 5. — The parties agree there shall be no strike, work stoppage, slowdown, lockout or other interruption of the continuity of the work in progress during the life of this Agreement unless a party refuses to abide by or to implement the majority decision of the Board of Adjustment.
>
> Any party to this Agreement who fails to abide by or refuses to adjust a dispute by the terms of this Article shall be in violation of this Agreement, and any other party or parties may take such appropriate economic action as deemed necessary against such person or parties."

and contains in Article IV the following provision pertinent to subcontractors:

"ARTICLE IV

SUB-CONTRACTORS

The Employer agrees that contractors or subcontractors to whom subcontracts are let verbally or written shall be required to comply with all requirements, conditions and intents of this Agreement, and shall continue to do so throughout all parts of their subcontract work as to all carpenter work performed on any construction site coming under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America.

The subcontract shall further require the Subcontractor to sign an Agreement with the Union requiring the Subcontractor to make payments to the Vacation Fund, Health Benefit Plan, Carpenters' Retirement Plan and Colorado Carpenters' Apprenticeship Trust Fund referred to in Articles XIV, XV, XVI, and XVII of this Agreement. Such payments shall be made only for work performed on the particular project by the Subcontractor's employees. Such payments shall be made to the same trusts, in the same amounts, and upon the same terms and conditions as required of the Contractor under this Agreement."

Furthermore, Article XIII, Section 4 provides, inter alia, that

"The Board of Adjustment is empowered to hear and decide disputes growing out of the interpretation and application of this agreement. . . ."

including disputes growing out of the above-cited contractual provisions.

7. The defendants above named admit in part and deny

in part the allegations contained in paragraph 7 of the Amended Complaint. Defendants Carpenters District Council of Southern Colorado and Local 1340 are members of the Colorado Building and Construction Trades Council. However, the above named defendants do not have sufficient knowledge or information with which to form a belief as to the truth or falsity of all of the other allegations contained in paragraph 7 of the Amended Complaint, some of which constitute legal conclusions, and therefore deny same.

8, 9. The above named defendants do not have sufficient knowledge or information with which to form a belief as to the truth or falsity of the allegations contained in paragraphs 8 and 9 of the Amended Complaint, and therefore deny same.

10. The above named defendants deny all of the allegations contained in paragraph 10 of the Amended Complaint. By way of further answer the defendants named above aver that all of the allegations contained in paragraph 10 of the Amended Complaint constitute legal conclusions which require no answer.

11. The above named defendants deny all of the allegations contained in paragraph 11 of the Amended Complaint.

12, 13, 14. The above named defendants do not have sufficient knowledge or information with which to form the belief as to the truth or falsity of the allegations contained in paragraphs 12, 13 and 14 of the Amended Complaint, and therefore deny the same. Defendants deny paragraph 14.

15. Defendants Carpenters District Council of Southern Colorado and Local 1340 deny each and every other allegation contained in plaintiff's Amended Complaint not otherwise herein expressly admitted or denied.

First Affirmative Defense

The Amended Complaint fails to state a cause of action upon which relief can be granted.

Second Affirmative Defense

This Court has no jurisdiction over the subject matter of this action because it is pre-empted by the National Labor Relations Board.

Third Affirmative Defense

This Court has no jurisdiction over the subject matter of this action because it involves the interpretation and application of the collective bargaining agreement previously referred to in paragraph 5 of the within answer which is within the sole and exclusive province of the dispute resolution machinery contained therein which provisions contain the exclusive remedy for breaches thereof.

Fourth Affirmative Defense

The plaintiff is barred from bringing this action by its failure to exhaust the exclusive contractual remedies contained in Article XIII of the collective bargaining agreement previously referred to in paragraph 5 of the within answer.

Fifth Affirmative Defense

The plaintiff is barred by the doctrine of laches from bringing this action.

Sixth Affirmative Defense

The plaintiff has waived the right to make this claim and is estopped by its conduct from doing so.

Seventh Affirmative Defense

This Court has no jurisdiction over the subject matter of this action since the jurisdictional requirements of 29 U.S.C. §185 are not fully satisfied herein.

Eighth Affirmative Defense

The defendants Carpenters District Council of Southern Colorado and Local 1340, without waiving their contention that the interpretation and application of the provisions of the aforementioned collective bargaining agreement is within the sole and exclusive province of the disputes resolution machinery agreed to therein, assert that they have neither waived their right, nor the right of the employees they represent, to honor a picket line established by another labor organization.

Ninth Affirmative Defense

The plaintiff has failed to join necessary or indispensable parties under Federal Rules Civil Procedure No. 19.

Tenth Affirmative Defense

This Court lacks jurisdiction over defendant Local 1340.

WHEREFORE, the defendants Carpenters District Council of Southern Colorado and Local 1340 pray that the Amended Complaint be dismissed in its entirety and that the defendants be awarded costs and such other and further relief as to this Court seems proper.

COUNTERCLAIM

1. Defendant Carpenters District Council of Southern Colorado is a labor organization within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. §151, et. seq., is an unincorporated association, and has its principal office in Colorado Springs, Colorado.

2. Defendant Carpenters District Council of Sotuhern Colorado represents employees in an industry effecting commerce and plaintiff is an employer in an industry effecting commerce, as that term is defined in the National Labor Relations Act, as amended, 29 U.S.C. §152.

3. Plaintiff is a corporation organized under and existing by virtue of the laws of the State of Colorado with principal office and place of business at Fort Collins, Colorado.

4. Jurisdiction over this Counterclaim is granted the Court by the provisions of 29 U.S.C. §185.

5. Plaintiff and defendant Carpenters District Council of Southern Colorado are parties to a collective bargaining agreement known as "Carpenters Building Construction 1972-75 Agreement" effective May 1, 1972 to, through, and including April 30, 1975.

6. Said collective bargaining agreement provides in Article XIII entitled "Contractural (sic) Disputes" a mandatory dispute settlement procedure culminating in a Board of Adjustment hearing and the selection of an impartial chairman. Said Board of Adjustment has final and binding authority to resolve disputes involving the application or interpretation of the terms of said agreement.

7. A dispute involving the application or interpretation of the above mentioned agreement within the meaning of Article XIII, Section 1 of said agreement has arisen between the plaintiff and defendant Carpenters District Council of Southern Colorado in that plaintiff alleges in its Amended Complaint that said defendant has violated Article XIII, Section 5 pertaining to strikes, work stoppages, etc. and Article IV pertaining to subcontracts.

8. In accordance with Article XIII of the above mentioned collective bargaining agreement, plaintiff has a mandatory obligation at the time the above described dispute arose to utilize the dispute settlement procedures provided for in said article, and the plaintiff's failure to abide by the terms of said article constitutes an express violation of said collective bargaining agreement, thereby giving rise to the express right in the defendant Carpenters District Council of Southern Colorado to take appropriate economic action against the plaintiff.

9. By commencing the within lawsuit against defendants Carpenters District Council of Southern Colorado and Local 1340 for breach of their contractual promises not to strike and for violating their agreement by attempting to change the provisions of Article IV entitled "Sub-contractors" of the above mentioned collective bargaining agreement, the plaintiff has flagrantly disregarded its mandatory obligation to abide by the contractual dispute settlement procedures set forth in said collective bargaining agreement, and the plaintiff violated the express terms of Article XIII of said collective bargaining agreement.

10. As a proximate result of plaintiff's above described breach of the above mentioined collective bargaining agree-

ment, the defendant has suffered damages including, inter alia, the cost of defending the within lawsuit.

WHEREFORE, defendant Carpenters District Council of Southern Colorado prays that this Honorable Court grant the following relief:

1. That judgment be entered in favor of the defendant Carpenters District Council of Southern Colorado against the plaintiff and that the defendant be awarded all costs incurred, including reasonable attorney's fees, in defending the within lawsuit.

2. That the Court award defendant such other and further relief as this Court may deem proper.

7. Excerpts from Respondent's Pre-Trial Statement (March 11, 1974)

II. JURISDICTION

Admitted in part and denied in part. Plaintiff asserts this action arises under Section 301(a) of the Labor-Management Relations Act, as amended, 29 U.S.C.A. §185. Defendant Carpenters District Council of Southern Colorado admit to the jurisdictional allegation. Defendant Local 1340 denies that the Court has jurisdiction by virtue of said Act.

III. AMENDMENTS TO PLEADING

Plaintiff attaches hereto a Motion to Amend Complaint pursuant to the Federal Rules of Civil Procedure, Rule 14.

IV. PRELIMINARY MOTIONS REMAINING TO BE DETERMINED

Remaining to be determined is Plaintiff's Motion to Amend Complaint.

V. GENERAL NATURE OF THE CLAIM TO THE PARTIES

A. Plaintiff's Claim

Plaintiff is a party to a collective bargaining agreement with Defendants Carpenters District Council of Southern Colorado (hereafter called Council) and Local 1340 which agreement contains promises by the Carpenters Union that its members will not strike or picket Plaintiff during the period of that agreement. Plaintiff claims that the agent of Defendants, the Colorado Building and Construction Trades Council, requested the Plaintiff to sign a different labor agreement, which, if signed, would change some of the provisions of the Carpenter Union labor agreement. Plaintiff further claims that when it refused to sign that agreement, the Building Trades Council picketed two of its construction sites on or about March 8 and 16, 1973, and on or about April 3, 1973. When the picketing commenced, that picketing should be construed as picketing being done by the Carpenters Union since the Building Trades Council is their agent and, therefore, the mere act of picketing by the Building Trades Council is violative of the no-strike, no-picketing promises of the Carpenter agreement.

Plaintiff further claims that when the Carpenter Union respects any picket line, including a Building Trades Council picket line, whether or not the picketing is being conducted by an agent of Defendants, the Union thereby violates its promises to Plaintiff not to strike during the course of that collective bargaining agreement.

Plaintiff further claims that it suffered damages due to the picketing of Defendants' agent, the Building Trades Council, and that it also suffered damages due to the strike conducted by the Defendants.

• • •

C. Uncontroverted Facts

It appears to Plaintiff that almost all relevant facts are controverted herein. It is uncontroverted that Plaintiff and Defendant Carpenters District Council of Southern Colorado are parties to the subject collective bargaining agreement. It is also uncontroverted that the Colorado Building and Construction Trades Council commenced picketing a Fort Collins construction site of Plaintiff on March 8, 1973 and continued that picket until March 16, 1973. It is also uncontroverted that on April 3, 1973 and continuing to April 13, 1973 the Building Trades Council resumed picketing construction sites of Plaintiff. It is also uncontroverted that Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 are members of the Colorado Building and Construction Trades Council.

VI ISSUES OF FACT AND LAW

A. Contested Issues of Fact

The contested issues of fact are the following:

1. Is Defendant Local 1340 a party to the subject labor agreement?

2. When the Building Trades Council picketed in the instant case, was it acting as the agent of Defendants?

3. Did Plaintiff suffer monetary damages by the picketing of the Building Trades Council and/or by the strike of Defendants and if so, how much?

4. Did Defendants or either of them induce or coerce their members into respecting the Building Trades Council picket line?

5. Did the members of Defendants refuse to perform services for Plaintiff in violation of the collective bargaining agreement?

B. Contested Issues of Law

In addition to the issues of law implicit in the foregoing issues of fact, the outstanding issues of law are:

1. As a matter of law, does the action of the Defendant herein constitute a breach of their no-strike, no-picket promises to Plaintiff?

8. Excerpts from Petitioners' Pre-Trial Statement (March 11, 1974)

2. JURISDICTION

This action arises under 29 U.S.C. §185.

3. AMENDMENTS TO PLEADINGS

The Defendants above-named have filed a Motion to Amend Answer simultaneously herewith in which the Defendants request that their Answer be amended to add the following:

Eleventh Affirmative Defense

The Plaintiff has failed to mitigate its damages.

and to correct Paragraph 7 to read as follows:

7. The defendants above-named admit in part and deny in part the allegations contained in Paragraph 7 of the Amended Complaint. Defendant Local 1340 is an affiliate of the Colorado Building and Construction Trades Council, whereas defendant Carpenters District Council of Southern Colorado is not. Nevertheless, the above-named defendants do not have sufficient knowledge or information with which to form a belief as to the truth or falsity of all of the other allegations contained in Paragraph 7 of the Amended Complaint, some of which constitute legal conclusions, and therefore, deny same.

4. PRELIMINARY MOTIONS REMAINING TO BE DETERMINED

There are no other preliminary motions to be determined at this time. However, because discovery by both parties is presently in progress, Defendants above-named reserve the right to move for a summary judgment or other appropriate motions based upon present or future discovery.

5. (A) GENERAL NATURE OF THE CLAIMS OF THE PARTIES

b. Defendants' Claim

The Plaintiff contends that the Defendant Carpenters' unions have a labor agreement with the Plaintiff which con-

tains a promise not to strike or picket the Plaintiff and that said promise was violated by the picketing of the Colorado Building Construction Trades Council in March and April, 1973 because the Trades Council was acting as the agent of the Carpenter Defendants at this time. In addition, the Plaintiff also contends that the Carpenter Defendants coerced their members into not working for Plaintiff during this same period and thereby directly violated the no-strike promises contained in the collective bargaining agreement with the Plaintiff.

The Defendant Carpenter unions deny Plaintiff's allegaions of direct and indirect violation of the Carpenters' collective bargaining agreement, which is known as the "Carpenters' Building Construction 1972-75 Agreement." It is the Defendant Carpenter unions' position that the Colorado Building Construction Trades Council is a separate and distinct labor organization with its own purposes and goals and that in submitting its own subcontract agreement to the Plaintiff for signature and in conducting picketing against Plaintiff in March and April, 1973, the Colorado Building Construction Trades Council was acting on its own initiative pursuing its own goals and was not acting as the agent of the Carpenter Defendants herein. The Defendant Carpenters District Council of Southern Colorado is a party to the aforementioned collective bargaining agreement with the Plaintiff, but is not a member of the Colorado Building Construction Trades Council and, therefore, has no agency relationship to the Trades Council. On the other hand, Defendant Local 1340 is an affiliate of the Colorado Building Construction Trades Council, but neither it nor the Defendant Carpenters District Council of Southern Colorado authorized or ratified the Trades Council picketing. Furthermore, the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with the Plaintiff.

It is also the Defendant Carpenter unions' position that

even if the alleged agency relationship were found, the alleged picketing does not constitute a violation of the collective bargaining agreement, as the no-strike provision contained in Article XIII therein does not preclude the union from honoring the picket line of another labor organization.

Furthermore, the Plaintiff alleges at Paragraphs 13 and 14 of its Amended Complaint that the Carpenter Defendants have violated the aforementioned collective bargaining agreement by attempting to change the provisions of Article IV, entitled "Subcontractors," by means of the Trades Council picket and have violated Article XIII relating to strikes, work-stoppages, etc., respectively. It is the Defendant Carpenter unions' position that these two alleged violations of the collective bargaining agreement are clearly disputes involving the interpretation and application of said collective bargaining agreement, and therefore, the resolution of these disputes lies solely and exclusively within the province of the dispute resolution machinery contained in Article XIII of said collective bargaining agreemnt. Thus, this Court has no jurisdiction over the subject matter of this action and the Plaintiff is barred from seeking recovery in this action by its failure to exhaust the exclusive and mandatory contractual remedies provided in Article XIII of said collective bargaining agreement.

It is also the Defendant Carpenter unions' position that this Court lacks jurisdiction over the subject matter of this action because it is pre-empted by the National Labor Relations Act as amended, that the Plaintiff has failed to join necessary or indispensable parties under Federal Rules of Civil Procedure No. 19 – i.e., the numerous other labor organizations which are members of the Colorado Building Construction Trades Council and which are responsible for the damages the Plaintiff allegedly sustained, that the Plaintiff has failed to

mitigate its damages, that the Plaintiff is barred by laches and is estopped from bringing the within lawsuit, and that the Plaintiff has failed to state a claim upon which relief can be granted.

(B) UNCONTROVERTED FACTS

The Defendants above-named contend that the following facts are uncontroverted:

1. Plaintiff and Defendant Carpenters District Council of Southern Colorado are parties to the collective bargaining agreement known as "Carpenters' Building Construction 1972-75 Agreement."

2. Said collective bargaining agreement contains in Article XIII, entitled "Contractural Disputes," a provision relating to strikes, working-stoppages, etc., against Plaintiff, and contains in Article IV, entitled "Subcontractors," a provision relating to the Plaintiff's obligations vis-a-vis its subcontractors performing carpenter work.

3. The Carpenters Building Construction Trades Council submitted to the Plaintiff for its requested signature a labor agreement which would require, inter alia, that the Plaintiff contract only with union subcontractors in most, if not all, phases of its construction work in the future.

4. The Colorado Building Construction Trades Council picketed Plaintiff in Fort Collins, Colorado, in the Spring of 1973, whereas the Carpenter Defendants herein did not picket the Plaintiff during all times material herein.

5. Defendant Local 1340 is not a party to the aforemen-

tioned collective bargaining agreement, whereas Carpenters District Council of Southern Colorado is a party to said agreement.

6. The Plaintiff has failed to invoke or pursue its contractual remedies provided for in Article XIII of the aforementioned collective bargaining agreement, including reducing its dispute to writing, referring its dispute(s) to the Board of Adjustment or to arbitration before an Impartial Arbitrator.

6. ISSUES OF FACT AND LAW

(A) Contested Issues of Fact:

1. Does the aforementioned collective bargaining agreement preclude the right of the Carpenter Defendants to honor the picket line of another labor organization?

2. Whether the parties to the aforementioned collective bargaining agreement intended that the disputes involved herein are subject to the dispute resolution procedures provided for in said collective bargaining agreement.

3. Whether the Plaintiff took any steps toward invoking or pursuing the dispute resolution procedures provided under the aforementioned collective bargaining agreement.

4. To what extent did the Carpenter Defendants cause the damages allegedly sustained by the Plaintiff, and to what extent were said damages caused by other labor organizations?

5. Whether the Building Construction Trades Council is a separate labor organization from the Carpenter Defendants.

6. Whether the decision of the individual carpenter employees not to cross the within picket line constitutes a breach by the Carpenter Defendants of the no-strike provision of the within mentioned collective bargaining agreement.

(B) Contested Issues of Law:

1. Whether the Colorado Building Construction Trades Council was the agent of the Carpenter union Defendants as alleged in the Amended Complaint.

2. Whether the picketing of the Colorado Building Construction Trades Council was authorized or ratified by the Carpenter Defendants, and whether or not the Trades Council acted within the scope of said authority.

3. Whether the picketing of the Colorado Building Construction Trades Council constituted a violation by the Carpenter Defendants herein of the aforementioned collective bargaining agreement.

4. Whether the Carpenter union Defandants induced, encouraged, or coerced their members into refusing to work for Plaintiff, and if so, whether such conduct constitutes a breach of the aforementioned collective bargaining agreement.

5. Whether the alleged conduct of the Carpenter Defendants caused the cessation or interruption of work complained of, and whether said Defendants are legally responsible for all damages allegedly sustained.

6. Whether Carpenter Defendants attempted to change Article IV, entitled "Subcontractors," of the aforementioned collective bargaining agreement by the action of the Colorado

Building Construction Trades Council in seeking its own collective bargaining agreement from the Plaintiff.

7. Whether the contractual violations alleged by the Plaintiff are disputes within the meaning of Article XIII, entitled "Contractural Disputes," of the aforementioned collective bargaining agreement, and whether the pursuit of the dispute resolution machinery provided for in Article XIII of said collective bargaining agreement, including participation in an arbitration hearing before an Impartial Chairman of the Board of Adjustment is a prerequisite or pre-condition to the Plaintiff's right to sue for breach of said agreement, and whether the Plaintiff's failure to exhaust its contractual remedies bars recovery herein.

8. Whether the dispute resolution machinery provided in Article XIII of the aforementioned collective bargaining agreement is mandatory and exclusive and whether the Plaintiff's failure to invoke said dispute resolution machinery entitles the Defendant Carpenters District Council of Southern Colorado to recover the damages it has sustained as a result of Plaintiff's failure to do so.

9. Whether the exercise of free choice by an individual carpenter employee in regard to the decision of to cross or not to cross the within mentioned picket line is a breach of the aforementioned collective bargaining agreement, and if so, whether such alleged breach gives rise to a claim for damages against the Defendant Carpenters District Council of Southern Colorado, against Defendant Local 1340 or against both.

10. Whether the Defendant Carpenters District Council of Southern Colorado and/or Defendant Local 1340 are responsible in damages for the acts of the Colorado Building Con-

struction Trades Council which is a separate and distinct labor organization.

11. Whether the Carpenter Defendants as well as their individual employee members are precluded by the aforementioned collective bargaining agreement from honoring the picket line of the Colorado Building Trades Construction Council which is another labor organization.

12. Whether the Plaintiff has mitigated its damages.

13. Whether Plaintiff has failed to join necessary or indispensable parties under the Federal Rules of Civil Procedure No. 19.

14. Whether this Court lacks jurisdiction over the subject matter of this action because it is preempted by the National Labor Relations Act as it is amended.

15. Whether or not the Plaintiff has stated a claim upon which relief can be granted.

9. Petitioners' Suggestion to Dismiss Pursuant to Rule 12(h)(3) (July 10, 1974)

COME NOW the Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, and move this Honorable Court to Dismiss the above-captioned Action on the grounds that the Court lacks jurisdiction over the subject matter because the Pleadings and the Depositions on file show on their face that the controversy described therein is one within the exclusive jurisdiction of an arbitrator selected and acting pursuant to the provisions of Article XIII of the

collective bargaining agreement upon which this Action is based.

10. Excerpts from Petitioners' Brief in Support of Suggestion to Dismiss Pursuant to Rule 12(h) (3) (July 10, 1974)

PRELIMINARY STATEMENT

COME NOW the Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, by and through its attorneys, the LAW OFFICES OF JOHN W. McKENDREE, and suggest pursuant to Rule 12(h)(3) of the Fed.R.Civ.P. that this Court is without jurisdiction over the subject matter of the within controversy and hence should Order dismissal of the Action. Bank v. U.S., 16 F.R.D. 310, 312-313 (S.D. Calif. 1954). See also Arcaya v. Estrada, 24 F.R.Serv. 12 h. 234, Case 1 (S.D.N.Y. 1957).

ARGUMENT

THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE INSTANT DISPUTE BECAUSE: (1) THE DISPUTE IS SUBSTANTATIVELY ARBITRABLE; (2) THE FINAL AND BINDING ARBITRATION PROCEDURES PROVIDED FOR IN THE COLLECTIVE BARGAINING AGREEMENT ARE AVAILABLE TO THE PLAINTIFF; and (3) THE PLAINTIFF FAILED TO UTILIZE SUCH PROCEDURES BEFORE INSTITUTION OF THE PRESENT ACTION.

In United Steelworkers v. American Mfg. Co., Inc., 363 U.S. 564 (1960), the Supreme Court expressly delimited the role of the judiciary in suits under Section 301(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §185(a):

> . . . The function of the Court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the parties seeking arbitration is making a claim which on its face is governed by the contract. Whether the Moving Party is right or wrong is a question of contract interpretation for the arbitrator. *In these circumstances the Moving Party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.* (emphasis supplied) 363 U.S. at 567-8
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> . . . When the judiciary undertakes to determine the merits of the grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, *it usurps a function which under that regime is entrusted thearbitration tribunal.* (emphasis supplied) 363 U.S. at 569.

Although American Mfg. was a Section 301 action to compel arbitration, the courts recognized that the Federal policy favoring arbitration of disputes manifested in that case, as in the other Steelworker Trilogy cases, United Steelworkers v. Warrior Gulf and Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960), imposed a general mandate to give way to the jurisdiction of the arbitrator unless it could be said with "positive assurance" that a particular dispute was not substantatively arbitrable. United Steelworkers v. Warrior Gulf and Navigation Co., 363 U.S. at 582-3.

Thus, in Operating Engineers v. Dow Chemical Co., 348 F. Supp. 1149, 1151 (S.D.Tex. 1972), the District Court found the dispute before it to be substantively arbitrable and thus dismissed the action for lack of jurisdiction, commenting:

> ... The Supreme Court has made it clear that when the collective bargaining agreement contains an arbitration procedure and the arbitration procedure covers the question in dispute, a federal court has no jurisdiction under Section 301 unless the arbitration procedure has first been utilized.... The court's function is to determine if it is an arbitrable dispute – if it is, and if the arbitration procedure has not been followed, the court must dismiss for lack of jurisdiction. (citations omitted)

See also Printing Industries of St. Louis, Inc. v. Bindery Local 55, 347 F. Supp. 339 (E.D. Mo. 1972); Royal Industrial Union v. Royal McBee Corp., 217 F.Supp. 277 (D.Conn. 1963). Compare Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) with U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971).

Indeed, the Plaintiff Reid Burton has recognized that failure to exhaust contractual disputes' remedies acts as a bar to subject matter jurisdiction of the Court in the Fourth Defense of its December 5, 1973, Reply to the Defendants' Counterclaim.

Instantly, there is no doubt that Plaintiff Reid Burton's claim is: (1) based on an alleged breach of the collective bargaining agreement by the Defendants Carpenters District Council of Southern Colorado and Local 1340; (2) that such claim is substantatively arbitrable; and, (3) that the Plaintiff failed to exhaust its contractual remedies before institution of the present Action. Consequently, the Defendant Unions suggest that the Court is without subject matter jurisdiction and that the instant dispute must be dismissed.

In its most recent Motion to Amend Complaint, filed with the Court on March 7, 1974, the Plaintiff stated as grounds for

the addition of Paragraph 15 to its Amended Complaint the following:

> ... That, as previously expressed in briefs to this Court, Plaintiff is proceeding herein on two theories: (a) That a Building Trades Council picket line, since the Building Trades Council is an agent of Defendant, breaches the collective bargaining agreement; and (b) That Defendant, because of their no-strike pledges to the Plaintiff, breached their collective bargaining agreement when they refused services to the Plaintiff because of any picket line.

Although heretofore the Defendants have questioned whether the Defendant Local 1340 was a party to the collective bargaining agreement entered into by Reid Burton and the Carpenters District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreement. Consolidation Coal Co. v. United Mine Workers, Local 5869, 362 F.Supp. 1073 (S.D.W.Va. 1973). As a consequence, both Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 would be bound by an arbitral award issued in accordance with the provisions of Article XIII of the collective bargaining agreement.

11. Excerpts from Petitioners' Amended Pre-Trial Statement (July 23, 1974)

2. JURISDICTION

The Court has jurisdiction over the above-described Defendants pursuant to Section 301(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. 185(a).

3. AMENDMENT TO PLEADINGS

At a prior Pre-Trial Conference, the Court permitted the Defendants to amend their Answer by alleging an Eleventh Affirmative Defense.

4. PRELIMINARY MOTIONS REMAINING TO BE DETERMINED

The Defendants have with the filing of the within Amended Defendants' Pre-Trial Statement, filed a Suggestion to Dismiss pursuant to Rule 12(h)(3) of the Fed. R. Civ. P. Consequently, the Suggestion to Dismiss remains to be determined by the Court.

5. GENERAL NATURE OF THE CLAIMS OF THE PARTIES

(A) b. Defendants' Claim

The Defendant Carpenter unions deny Plaintiff's allegations of direct and indirect violation of the Carpenters' collective bargaining agreement, which is known as the "Carpenters' Building Construction 1972 - 1975 Agreement." It is the Defendant Carpenter unions' position that the Colorado Building Construction Trades Council is a separate and distinct labor organization with its own purposes and goals and that in submitting its own subcontract agreement to the Plaintiff for signature and in conducting picketing against Plaintiff in March and April, 1973, the Colorado Building Construction Trades Council was acting on its own initiative pursuing its own goals and was not acting as the agent of the Carpenter Defendants herein. The Defendant Carpenters District Council of Southern Colorado is a party to the aforementioned collective bar-

gaining agreement with the Plaintiff, but is not a member of the Colorado Building Construction Trades Council, and, therefore, has no agency relationship to the Trades Council. On the other hand, Defendant Local 1340 is an affiliate of the Colorado Building Construction Trades Council, but neither it nor the Defendant Carpenters District Council of Southern Colorado authorized or ratified the Trades Council picketing. Furthermore, the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with the Plaintiff.

It is also the Defendant Carpenter unions' position that even if the alleged agency relationship were found, the alleged picketing does not constitute a violation of the collective bargaining agreement, as the no-strike provision contained in Article XIII therein does not preclude the union from honoring the picket line of another labor organnization. The individual carpenters who refused to cross the picket line did so of their own volition.

Furthermore, the Plaintiff alleges at Paragraphs 13 and 14 of its Amended Complaint that the Carpenter Defendants have violated the aforementioned collective bargaining agreement by attempting to change the provisions of Article IV, entitled "Subcontractors," by means of the Trades Council picket and have violated Article XIII relating to strikes, work-stoppages, etc., respectively. It is the Defendant Carpenter unions' position that these two alleged violations of the collective bargaining agreement are clearly disputes involving the interpretation and application of said collective bargaining agreement, and therefore, the resolution of these disputes lies solely and exclusively within the province of the dispute resolution machinery contained in Article XIII of said collective bargaining agreement. Thus, this Court has no jurisdiction over

the subject matter of this action and the Plaintiff is barred from seeking recovery in this action by its failure to exhaust the exclusive and mandatory contractual remedies provided in Article XIII of said collective bargaining agreement.

It is also the Defendant Carpenter unions' position that this Court lacks jurisdiction over the subject matter of this action because it is pre-empted by the National Labor Relations Act, as amended, that the Plaintiff has failed to join necessary or indispensable parties under Federal Rules of Civil Procedure No. 19—i.e., the numerous other labor organizations which are members of the Colorado Building Construction Trades Council and which are responsible for the damages the Plaintiff allegedly sustained, that the Plaintiff has failed to mitigate its damages, that the Plaintiff is barred by laches and is estopped from bringing the within lawsuit, and that the Plaintiff has failed to state a claim upon which relief can be granted.

The Defendants have further counterclaimed for damages suffered, including, inter alia, the cost of defending the within lawsuit, by reason of the fact the Plaintiff commenced the instant lawsuit in violation of its mandatory obligation to utilize the dispute settlement procedure provided for in the subject collective bargaining agreement. Defendants claim that Plaintiff's failure to abide by the terms of said collective bargaining agreement constitutes as express violation of such agreement and gives rise to a right to recover damages for such breach.

(B) UNCONTROVERTED FACTS

The Defendants above-named contend that the following facts are uncontroverted.

1. Plaintiff and Defendant Carpenters District Council of Southern Colorado are parties to the collective bargaining agreement know as "Carpenters' Building Construction 1972-1975 Agreement."

2. Said collective bargaining agreement contains in Article XIII, entitled, "Contractual Disputes," a provision relating to strikes, workstoppages, etc., against Plaintiff, and contains in Article IV, entitled, "Subcontractors," a provision relating to the Plaintiff's obligations vis-a-vis its subcontractors performing carpenter work.

3. The Carpenters Building Construction Trades Council submitted to the Plaintiff for its requested signature a labor agreement which would require, inter alia, that the Plaintiff contract only with union subcontractors in most, if not all, phases of its construction work in the future.

4. The Colorado Building Construction Trades Council picketed Plaintiff in Fort Collins, Colorado, in the Spring of 1973, whereas the Carpenter Defendants herein did not picket the Plaintiff during all times material herein.

5. The Plaintiff has failed to invoke or pursue its contractual remedies provided for in Article XIII of the aforementioned collective bargaining agreement, including reducing its dispute to writing, referring its dispute(s) to the Board of Adjustment or to arbitration before an Impartial Arbitrator.

6. It is uncontroverted that Defendant Local 1340 is a member of the Colorado Building and Construction Trades Council.

6. ISSUES OF FACT AND LAW

(A) Contested Issues of Fact:

1. Does the aforementioned collective bargaining agreement preclude the right of the Carpenter Defendants to honor the picket line of another labor organization?

2. Whether the parties to the aforementioned collective bargaining agreement intended that the disputes involved herein be subject to the dispute resolution procedures provided for in said collective bargaining agreement.

3. To what extent did the Carpenter Defendants cause the damages allegedly sustained by the Plaintiff, and to what extent were said damages caused by other labor organizations?

4. Whether the Building Construction Trades Council is a separate labor organization from the Carpenter Defendants.

5. Whether the decision of the individual carpenter employees not to cross the within picket line constitutes a breach by the Carpenter Defendants of the no-strike provision of the within-mentioned collective bargaining agreement.

6. To what extent have the Defendants been damaged by Plaintiff's failure to exhaust its contractual remedies before commencement of the instant action?

(B) Contested Issues of Law:

1. Whether the Colorado Building Construction Trades Council was the agent of the Carpenter union Defendants as alleged in the Amended Complaint.

2. Whether the picketing of the Colorado Building Construction Trades Council was authorized or ratified by the Carpenter Defendants, and whether or not the Trades Council acted within the scope of said authority.

3. Whether the picketing of the Colorado Building Construction Trades Council constituted a violation by the Carpenter Defendants herein of the aforementioned collective bargaining agreement.

4. Whether the Carpenter union Defendants induced, encouraged, or coerced their members into refusing to work for Plaintiff, and if so, whether such conduct constitutes a breach of the aforementioned collective bargaining agreement.

5. Whether the alleged conduct of the Carpenter Defendants caused the cessation or interruption of work complained of, and whether said Defendants are legally responsible for all damages allegedly sustained.

6. Whether Carpenters Defendants attempted to change Article IV, entitled, "Subcontractors," of the aforementioned collective bargaining agreement by the action of the Colorado Building Construction Trades Council in seeking its own collective bargaining agreement from the Plaintiff.

7. Whether the contractual violations alleged by the Plaintiff are disputes within the meaning of Article XIII, entitled, "Contractual Disputes," of the aforementioned collective bargaining agreement, including participation in an arbitration hearing before an Impartial Chairman of the Board of Adjustment is a prerequisite or pre-condition to the Plaintiff's right to sue for breach of said agreement, and whether the Plaintiff's failure to exhaust its contractual remedies bars recovery herein.

8. Whether the dispute resolution machinery provided in Article XIII of the aforementioned collective bargaining agreement is mandatory and exclusive and whether the Plaintiff's failure to invoke said dispute machinery entitles the Defendant Carpenters District Council of Southern Colorado to recover the damages it has sustained as a result of Plaintiff's failure to do so.

9. Whether the exercise of free choice by an individual carpenter employee in regard to the decision of to cross or not to cross the within-mentioned picket line is a breach of the aforementioned collective bargaining agreement, and if so, whether such alleged breach gives rise to a claim for damages against the Defendant Carpenters District Council of Southern Colorado and against Defendant Local 1340 or against either.

10. Whether the Defendant Carpenters District Council of Southern Colorado and/or Defendant Local 1340 are responsible in damages for the acts of the Colorado Building Construction Trades Council which is a separate and distinct labor organization.

11. Whether the Carpenters Defendants as well as their individual employee members are precluded by the aforementioned collective bargaining agreement from honoring the picket line of the Colorado Building Trades Construction Council which is another labor organization.

12. Whether the Plaintiff has mitigated its damages.

13. Whether the Plaintiff has failed to join necessary or indispensable parties under the Federal Rules of Civil Procedure No. 19.

14. Whether this Court lacks jurisdiction over the subject matter of this action because it is pre-empted by the National Labor Relations Act as it is amended.

15. Whether or not the Plaintiff has stated a claim upon which relief can be granted.

12. Excerpts from Respondent's Pre-Trial Statement (July 23, 1974)

II. JURISDICTION

Admitted in part and denied in part. Plaintiff asserts this action arises under Section 301(a) of the Labor Management Relations Act, as amended, 29 U.S.C.A. §185. Defendant Carpenters District Council of Southern Colorado admit to the jurisdictional allegation. Defendant Local 1340 denies that the Court has juridiction by virtue of said Act.

III. AMENDMENTS TO PLEADING

Subsequent to the filing of the Complaint and Answer herein, Plaintiff moved to amend the Amended Complaint on a matter of clarification, and Defendant also moved to amend the Answer by alleging an Eleventh Affirmative Defense. At a prior pre-trial conference, the Court permitted both amendments and it was agreed that the allegations contained in each of the amendments would be presumed denied by the opposing party.

IV. PRELIMINARY MOTIONS REMAINING TO BE DETERMINED

None

V. GENERAL NATURE OF THE CLAIM OF THE PARTIES

A. Plaintiff's Claim

Plaintiff is a party to a collective bargaining agreement with Defendants Carpenters District Council of Southern Colorado (hereafter called Council) and Local 1340 which agreement contains promises by the Carpenters Union that its members will not strike or picket Plaintiff during the period of that agreement. Plaintiff claims that an agent of Defendants, the Colorado Building and Construction Trades Council, requested the Plaintiff to sign a different labor agreement, which, if signed, would change some of the provisions of the Carpenter Union labor agreement. Plaintiff further claims that when it refused to sign that agreement, the Building Trades Council picketed two of its construction sites on or about March 8, and 16, 1973, and on or about April 3, 1973. When the picketing commenced, that picketing should be construed as picketing being done by the Carpenters Union since the Building Trades Council is their agent and, therefore, the mere act of picketing by the Building Trades Council is violative of the no-strike, no-picketing promises of the Carpenter agreement. Plaintiff claims that the Carpenters Union induced and coerced its members to respect the picket line.

Plaintiff further claims that when the Carpenter Union respects any picket line, including a Building Trades Council picket line, whether or not the picketing is being conducted by an agent of Defendants, the Union thereby violates its promises to Plaintiff not to strike during the course of that collective bargaining agreement.

Plaintiff further claims that it suffered damages due to the

picketing of Defendants' agent, the Building Trades Council, and that it also suffered damages due to the strike conducted by the Defendants.

B. Defendants' Claim

The Plaintiff contends that the Defendant Carpenters' unions have a labor agreement with the Plaintiff which contains a promise not to strike or picket the Plaintiff and that said promise was violated by the picketing of the Colorado Building and Construction Trades Council in March and April, 1973 because the Trades Council was acting as the agent of the Carpenter Defendants at this time. In addition, the Plaintiff also contends that the Carpenter Defendants coerced their members into not working for Plaintiff during this same period and thereby directly violated the no-strike promises contained in the collective bargaining agreement with the Plaintiff.

The Defendant Carpenter unions deny Plaintiff's allegation of direct and indirect violation of the Carpenters' collective bargaining agreement, which is known as the "Carpenters' Building Construction 1972-75 Agreement." It is the Defendant Carpenter unions' position that the Colorado Building Construction Trades Council is a separate and distinct labor organization with its own purposes and goals and that in submitting its own subcontract agreement to the Plaintiff for signature and in conducting picketing against Plaintiff in March and April, 1973, the Colorado Building Construction Trades Council was acting on its own initiative pursuing its own goals and was not acting as the agent of the Carpenter Defendants herein. The Defendant Carpenters District Council of Southern Colorado is a party to the aforementioned collective bargaining agreement with the Plaintiff, but is not a member of the Colorado Building Construction Trades Council

and, therefore, has no agency relationship to the Trades Council. On the other hand, Defendant Local 1340 is an affiliate of the Colorado Building Construction Trades Council, but neither it nor the Defendant Carpenters District Council of Southern Colorado authorized or ratified the Trades Council picketing. Furthermore, the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with the Plaintiff.

It is also the Defendant Carpenter unions' position that even if the alleged agency relationship were found, the alleged picketing does not constitute a violation of the collective bargaining agreement, as the no-strike provision contained in Article XIII therein does not preclude the union from honoring the picket line of anothere union or its members.

Furthermore, the Plaintiff alleges at paragraphs 13 and 14 of its Amended Complaint that the Carpenter Defendants have violated the aforementioned collective bargaining agreement by attempting to change the provisions of Article IV, entitled "Subcontractors," by means of the Trades Council picket and have violated Article XIII relating to strikes, work stoppages, etc., respectively. It is the Defendant Carpenter unions' position that these two alleged violations of the collective bargaining agreement are clearly disputes involving the interpretation and application of said collective bargaining agreement and, therefore, the resolution of these disputes lies solely and exclusively within the province of the dispute resolution machinery contained in Article XIII of said collective bargaining agreement. Thus, this Court has no jurisdiction over the subject matter of this action by its failure to exhaust the exclusive and mandatory contractual remedies provided in Article XIII of said collective bargaining agreement.

It is also the Defendant Carpenter unions' position that

this Court lacks jurisdiction over the subject matter of this action because it is preempted by the National Labor Relations Act, as amended, that the Plaintiff has failed to join necessary or indispensable parties under Federal Rules of Civil Procedure No. 19 – i.e., the numerous other labor organizations which are members of the Colorado Building Construction Trades Council and which are responsible for the damages the Plaintiff allegedly sustained, that the Plaintiff has failed to mitigate its damages, that the Plaintiff is barred by laches and is estopped from bringing the within lawsuit, and that the Plaintiff has failed to state a claim upon which relief can be granted.

C. Uncontroverted Facts

It is uncontroverted that Plaintiff and Defendant Carpenters District Council of Southern Colorado are parties to the subject collective bargaining agreement. It is also uncontroverted that the Colorado Building and Construction Trades Council commenced picketing a Fort Collins construction site of Plaintiff on March 8, 1973 and continued that picket until March 16, 1973. It is also uncontroverted that on April 3, 1973 and continuing to April 13, 1973 the Building Trades Council resumed picketing construction sites of Plaintiff. The object of said BTC picketing was to force Plaintiff to sign a "subcontractor agreement." It is also uncontroverted that Defendant Local 1340 is a member of the Colorado Building and Construction Trades Council.

VI. ISSUES OF FACT AND LAW

A. Contested Issues of Fact

The contested issues of fact are the following:

1. Is Defendant Local 1340 a party to the subject labor agreement?

2. When the Building Trades Council picketed in the instant case, was it acting as the agent of Defendants?

3. Did Plaintiff suffer monetary damages by the picketing of the Building Trades Council and/or by the strike of Defendants and if so, how much?

4. Did Defendants or either of them induce or coerce their members into respecting the Building Trades Council picket line?

5. Did the members of Defendants refuse to perform services for Plaintiff in violation of the collective bargaining agreement?

B. Contested Issues of Law

In addition to the issues of law implicit in the foregoing issues of fact, the outstanding issues of law are:

1. As a matter of law, does the action of the Defendants herein constitute a breach of their no-strike, no-picket promises to Plaintiff?

13. Excerpts from Pre-Trial Order (September 28, 1974)

2. JURISDICTION.

This Action arises under 29 U.S.C. §185.

3. AMENDMENTS TO PLEADINGS.

None.

4. PRELIMINARY MOTIONS REMAINING TO BE DETERMINED.

The Defendants have filed with the Court a Suggestion to Dismiss pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure. The Plaintiff has filed a Motion for Assessment of all Attorney's Fees and Costs, and the Defendants have filed a cross Motion to Strike Plaintiff's Motion for Assessment of all Attorney's Fees and Costs. Consequently, the Defendants' Suggestion to Dismiss and Motion to Strike and the Plaintiff's Motion for Assessment of all Attorney's Fees and Costs remain to be determined by the Court.

5. GENERAL NATURE OF THE CLAIM OF THE PARTIES.

(A) a. Plaintiff's Claim

Plaintiff is a party to a collective bargaining agreement with Defendants Carpenters District Council of Southern Colorado (hereafter called Council) and Local 1340 which agreement contains promises by the Carpenters Union that its members will not strike or picket Plaintiff during the period of that Agreement. Plaintiff claims that an agent of Defendants, the Colorado Building and Construction Trades Council, requested the Plaintiff to sign a different labor agreement, which, if signed, would change some of the provisions of the Carpenter Union labor agreement. Plaintiff further claims that when it refused to sign that agreement, the Building Trades Council picketed two of its construtcion sites on or about March 8 and 16, 1973, and on or about April 3, 1973. When the picketing commenced, that picketing should be construed as picketing being done by the Carpenters Union since the Building Trades Council is their agent and, therefore, the mere act of picketing by the Building Trades Council is violative of the no-strike, no-picketing promises of the Carpenter agreemnt. Plaintiff

claims that the Carpenters Union induced and coerced its members to respect the picket line.

Plaintiff further claims that when the Carpenter Union respects any picket line, including a Building Trades Council picket line, whether or not the picketing is being conducted by an agent of Defendants, the Union thereby violates its promises to Plaintiff not to strike during the course of that collective bargaining agreement.

Plaintiff further claims that it suffered damages due to the picketing of Defendants' agent, the Building Trades Council, and that it also suffered damages due to the strike conducted by the Defendants.

(A) b. Defendants' Claims.

Before discussion of the specific nature of the Defendants' positions and claims, the Defendants feel it appropriate to review in passing the course of the pleadings and briefs in this litigation. On July 13, 1973, Plaintiff filed its Complaint in which it joined as party deefndants the Carpenters District Council of Southern Colorado, Local 1340 of the United Brotherhood of Carpenters and Joiners of America, and the Colorado Building and Construction Trades Council. Although the general nature of Plaintiff's claim is well known to the Court, it might simply be noted, as stated by the Plaintiff in its March 7, 1974 Motion to Amend Complaint, that the Complaint was based on two "theories": (a) "That a Building Trades Council picket line, since the Building Trades Council is an agent of Defendant, breaches the collective bargaining agreement; and (b) that Defendants, because of their no-strike pledges to the Plaintiff, breached their collective bargaining agreement when they refused services to the Plaintiff because

of any picket line." The Complaint, in its original and amended form, does not allege the existence of a contractual grievance and arbitration procedure.

On August 6, 1973, the Colorado Building and Trades Council filed with the Court a Motion to Dismiss and on August 20, 1973, all Defendants joined in a lengthy Brief in Support of Motion to Dismiss. In such Brief, the Defendants urged as reasons for dismissal: (1) the Complaint alleged no existence of a collective bargaining agreement between Plaintiff and the Colorado Building and Construction Trades Council and thus jurisdiction would not lie as against the Building and Construction Trades Council under Section 301 of the Act; (2) the Complaint failed to allege that either Defendant Carpenters District Council of Southern Colorado or Defendant Local 1340 engaged in strike or picketing activity against Plaintiff and, although alleging encouragement by the Carpenter Defendants of employees to engage in such activity, did not allege such encouragement to be violative of the collective bargaining agreement; (3) the Complaint requested injunctive relief proscribed by the Norris-LaGuardia Act, 29 U.S.C. §101 et seq., without alleging, in respect to the Carpenter Defendants, the various prerequisites for an injunction pursuant to Boys' Market, Inc. v. Retail Clerks, 398 U.S. 235 (1970), or, in respect to all Defendants, without alleging acts of violence; (4) the Complaint alleged a dispute over matters within the exclusive jurisdiction of the National Labor Relations Board; (5) the Complaint failed to state a claim upon which relief could be granted; and, (6) the Complaint failed to join indispensable parties, i.e., the various constituent members of the Colorado Building and Construction Trades Council.

On September 14, 1973, Plaintiff submitted an Amended Complaint and an Answer Brief to the Defendants' Brief in

Support of their Motion to Dismiss. The Amended Answer deleted all requests for injunctive relief, thus mooting the issue of compliance with Norris-LaGuardia and Boys' Market.

Defendants responded with Motions to Dismiss the Amended Complaint and subsequently filed a Brief in Support thereof. This Brief was substantially similar to the Defendants' initial Brief in Support of their Motions to Dismiss the original Complaint but excluded, in view of the modifications contained in the Amended Complaint, all references to Norris-LaGuardia. Then, on October 9, 1973, Defendants submitted a Reply Brief to the Plaintiff's September 14 Answer Brief.

On October 26, 1973, this Court heard oral argument on the Defendants' Motion to Dismiss and denied Dismissal as to the Carpenter Defendants while reserving its ruling as to the Defendant Colorado Building and Construction Trades Council. The issue as to the Colorado Building and Construction Trades Council involved its alleged agency relationship to the Carpenters Defendants as pled in the Amended Complaint, and on November 23, 1973, the Court granted the Building and Construction Trades Council's Motion to Dismiss, finding that under the averments of the Amended Complaint the Council was concerned with the dispute only as an agent of a disclosed principal and that consequently, jurisdiction under Section 301 of the Act would not lie against the Building and Construction Trades Council.

Previous to the November 23 Order, Defendants Carpenters District Council of Southern Colorado and Local 1340 filed an Answer on November 9, 1973. Inter alia, the Answer admitted jurisdiction under Section 301 as to the Carpenters District Council of Southern Colorado but denied jurisdiction under Section 301 and party status to the collective bargaining

agreement as to Local 1340. The Answer stated several affirmative defenses, including lack of subject matter jurisdiction because of the failure by Plaintiff to exhaust its contractual remedies, i.e., arbitration under Article XIII of the agreement. The Carpenters District Council of Southern Colorado further counterclaimed for damages arising from the failure of the Plaintiff to utilize the mandatory disputes resolution provision of the collective bargaining agreement.

On November 5, 1973, Plaintiff replied to Defendant Carpenters District Council of Southern Colorado's Counterclaim, affirmatively alleging, inter alia, that this Court was without subject matter jurisdiction because said Counterclaim involved a question of the application or interpretation of the collective bargaining agreement, thus indicating that the Plaintiff felt the dispute was in the exclusive domain of an arbitrator.

In March, 1974 (undated), Plaintiff filed a Pre-Trial Statements and, on March 7, 1974, Amended its Amended Complaint. On March 11, 1974, Defendants filed an Amended Answer and their initial Pre-Trial Statement.

On July 18, 1974, Plaintiff and Defendants filed Amended Pre-Trial Statements, and the Defendants filed a Suggestion to Dismiss with Supportive Brief.

On August 2, 1974, Plaintiff Answered Defendants' Suggestion to Dismiss and submitted to the Court a Motion for Assessment of All Attorney's Fees and Costs. On August 19, 1974, Defendants replied to the Plaintiff's Answer Brief and further moved to strike Plaintiff's Motion for Assessment of All Attorney's Fees and Costs.

Commencing in February, 1974, the parties engaged in discovery largely through the means of depositions. The

Plaintiff deposed L. A. Ader on February 11, 1974; John J. Donlon on February 11, 1974; Guy Van Portfleit on May 17, 1974; and Clois Gilleland on May 17, 1974. The Defendants deposed Reid D. Burton on February 15, 1974 and February 28, 1974; and Mary McLaughlin on April 3, 1974. Plaintiff also issued Request to Produce on February 20, 1974, and April 4, 1974.

The Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 deny Plaintiff's allegations of direct and/or indirect violation of the collective bargaining agreement denominated as the CARPENTERS' BUILDING CONSTRUCTION 1972 - 1975 AGREEMENT. It is the Defendant District Council's and the Defendant Local 1340's position that the Colorado Building and Construction Trades Council is a separate and distinct labor organization with its own purposes and goals and that in submitting its own subcontract agreement to the Plaintiff for signature and in conducting picketing against Plaintiff during March and April, 1973, the Building and Construction Trades Council was acting on its own initiative, pursuing its own goals and not acting as the agent of either of the Defendants herein. It should be further pointed out that the Defendant District Council is a party to the aforementioned collective bargaining agreement with Plaintiff, is not a member of the Colorado Building and Construction Trades Council, and neither is an agent of the Building and Construction Trades Council nor is the Building and Construction Trades Council an agent of Defendant District Council. Defendant Local 1340 is an affiliate of the Colorado Building and Construction Trades Council, is not a party to the aforementioned collective bargaining agreement with Plaintiff, and neither is the Defendant Local 1340 an agent of the Building and Construction Trades Council nor is the Build-

ing and Construction Trades Coucil an agent of Defendant Local 1340.

It is further the Defendants' position that even if the alleged agency relationship between either or both of them and the Colorado Building and Construction Trades Council were to be found, the picketing in question does not constitute a violation of the collective bargaining agreement because the no-strike provision contained in Article XIII thereof does not preclude the Union from honoring the picket line of another labor organization. Moreover, those individual carpenters who refused to cross the Colorado Building and Construction Trades Council's picket line did so of their own volition.

The Plaintiff alleges in Paragraphs 13 and 14 of its Amended Complaint that the Defendants have violated the subject collective bargaining agreement by attempting to modify or amend the provisions of Article IV, entitled, "Subcontractors," by means of the Colorado Building and Construction Trades Council's picket and have also violated Article XIII of the subject collective bargaining agreement. It is the Defendant Carpenters District Council of Southern Colorado's and Defendant Local 1340's position that these two alleged violations of the collective bargaining agreement are clearly disputes involving the interpretation and application of the subject collective bargaining agreement and that, therefore, the resolution of such alleged breaches of contract was solely and exclusively within the province of the disputes resolution machinery contained in Article XIII of the agreement. Consequently, the Plaintiff is barred from seeking recovery in this action by its failure to exhaust the exclusive and mandatory contractual remedies provided in Article XIII of the collective bargaining agreement, and this Court has no jurisdiction over the subject matter of the Plaintiff's claims for breach of contract.

Although the Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 submit that this Court does not have jurisdiction under Section 301 to reach the merits of the Plaintiff's claims for breach of contract, this Court does have threshold jurisdiction under Section 301 to determine whether the provisions of Article XIII of the collective bargaining agreement provide for final and binding arbitration of the subject matter of Plaintiff's claim. Threshold jurisdiction for this determination lies under Section 301 because Plaintiff's claim involves an alleged violation of a contract between an employer and a labor organization. Furthermore, the stance that the existence of applicable arbitration provisions deprives this Court of subject matter jurisdiction is not inconsistent with the stance that the Court has threshold jurisdiction under Section 301. Simply stated, the Court has jurisdiction to determine whether the Plaintiff's claims of breach of contract are substantively arbitrable, but once such claims are determined to be substantively arbitrable, the jurisdictional grant of authority under Section 301 to federal courts ceases. The Defendants see no purpose in reiterating here those arguments as to the substantive arbitrability of Plaintiff's claims, advanced in their brief in Support of their Suggestion to Dismiss. However, as regards this Court's jurisdiction under Section 301, the Defendants would point again only to United Steelworkers v. American Mfg. Co., 363 U.S. 564, 569 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-3 (1960); and Johnson Builders, Inc. v. Carpenters, Local 1095, 423 F.2d 137, 139 (10th Cir. 1970).

The only modification made by Defendants concerning their view of this Court's jurisdiction in the instant litigation involved whether threshold Section 301 jurisdiction lay as to Defendant Local 1340. Jurisdiction is determined initially on the face of the Complaint which instantly, both in its original

and amended forms, specifically alleged only that Defendant Local 1340 was a party to the subject collective bargaining agreement. This Defendant Local 1340 denies now and has consistently denied in its Answer, Amended Answer, Pre-Trial Statement and Amended Pre-Trial Statement. Both Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 submit that the only parties to a collective bargaining agreement are those who execute it. The instant collective bargaining agreement was executed between the Plaintiff and the Carpenters District Council of Southern Colorado. Moreover, as mentioned above, Section 301 confers jurisdiction only as to violations of contracts between employers and labor organizations. Strictly construed, therefore, Section 301 can be read to provide jurisdiction only over the specific parties to a collective bargaining agreement. Consequently, Local 1340 denied threshold jurisdiction to the Court under Section 301 because (1) the Complaint alleged Section 301 jurisdiction as against Local 1340 on the basis of party status alone and (2) the language of Section 301 can be read to confer jurisdiction only over the parties to a collective bargaining agreement.

Whether this Court has jurisdiction over Defendant Local 1340 under Section 301, however, has little effect on the resolution of those issues presented in the Defendants' Suggestion to Dismiss. If the Court were to determine that Section 301 jurisdiction would not lie as against Defendant Local 1340, the Local would necessarily be dismissed, as was the Colorado Building and Construction Trades Council, from this litigation. Conversely, if the Court were to have decided that it had Section 301 jurisdiction as to Defendant Local 1340, the issue of whether an arbitrator has primary jurisdiction over the merits of Plaintiff's claims would be unaffected. The Plaintiff imprecise pleading and the question of law as to the scope of coverage of Section 301 produced the threshold jurisdictional issue

as to Defendant Local 1340. Defendants respectfully submit that it misconstrues the pleadings to conclude that Defendant Local 1340 denied at any point in its Answer, Amended Answer, Pre-Trial Statement and Amended Pre-Trial Statement that it was bound to observe the various provisions of subject collective bargaining agreement.

It is also the Defendant Carpenters District Council of Southern Colorado's and Defendant Local 1340's position that this Court lacks jurisdiction over the subject matter of this action because of pre-emption by the National Labor Relations Act, as amended; that the Plaintiff has failed to join necessary or indispensable parties under Rule 19 of the Fed.R.Civ.P., i.e., the numerous other labor organizations which are members of the Colorado Building and Construction Trades Council and which are responsible for any damages allegedly sustained by Plaintiff; that the Plaintiff has failed to mitigate its damages by not utilizing replacements for those carpenters refusing to cross the Building and Construction Trades Council pickets; that the Plaintiff is barred by laches and is estopped from bringing the within lawsuit; and that the Plaintiff has failed to state a claim upon which relief can be granted.

The Defendant Carpenters District Council of Southern Colorado has further counterclaimed for damages suffered, including, inter alia, the costs of defending the within lawsuit, because the Plaintiff commenced this litigation in violation of its mandatory obligation to utilize the disputes settlement procedure provided for in Article XIII of the collective bargaining agreement. Defendant Carpenters District Council claims that Plaintiff's failure to abide by the terms of the collective bargaining agreement constitutes an express violation of such agreement and gives rise to recovery of damages for such breach. The Plaintiff has affirmatively replied that this Court is

without subject matter jurisdiction over the Defendant District Council's Counterclaim because the subject matter of such Counterclaim is substantively arbitrable. If the Court determines that the Plaintiff's claims are substantively arbitrable, then this Court will be required to determine, in order to resolve the Plaintiff's affirmative defense to the Counterclaim, whether the subject matter of the Counterclaim is substantively arbitrable.

(B) UNCONTROVERTED FACTS.

a. Plaintiff States that the Following are Uncontroverted Facts:

It is uncontroverted that Plaintiff and Defendant Carpenters District Council of Southern Colorado are parties to the subject collective bargaining agreement. It is also uncontroverted that the Colorado Building and Construction Trades Council commenced picketing a Fort Collins construction site of Plaintiff on March 8, 1973 and continued that picket until March 16, 1973. It is also uncontroverted that on April 3, 1973 and continuing to April 13, 1973 the Building Trades Council resumed picketing construction sites of Plaintiff. The object of said BTC picketing was to force Plaintiff to sign a "subcontractor agreement." It is also uncontroverted that Defendant Local 1340 is a member of the Colorado Building and Construction Trades Council.

b. The Defendants Contend that the Following Facts are Uncontroverted:

1. Plaintiff and Defendant Carpenters District Council of Southern Colorado are parties to the collective bargaining agreement known as "Carpenters' Building Construction 1972 - 1975 Agreement."

2. Said collective bargaining agreement contains in Article XIII, entitled, "Contractural Disputes," a provision relating to strikes, workstoppages, etc., against Plaintiff, and contains in Article IV, entitled, "Subcontractors," a provision relating to the Plaintiff's obligations vis-a-vis its subcontractors performing carpenter work.

3. The Carpenters Building Construction Trades Council submitted to the Plaintiff for its requested signature a labor agreement which would require, inter alia, that the Plaintiff contract only with Union subcontractors in most, if not all, phases of its construction work in the future.

4. The Colorado Building Construction Trades Council picketed Plaintiff in Fort Collins, Colorado, in the Spring of 1973, whereas the Carpenter Defendants herein did not picket the Plaintiff during all times material herein.

5. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement, whereas Carpenters District Council of Southern Colorado is a party to said agreement.

6. The Plaintiff has failed to invoke or pursue its contractual remedies provided for in Article XIII of the aforementioned collective bargaining agreement, including reducing its dispute to writing, referring its dispute(s) to the Board of Adjustment or to arbitration before an Impartial Arbitrator.

6. ISSUES OF FACT AND LAW.

(A) Contested Issues of Fact:

a. The Plaintiff Contends that the following Issues of Fact are Contested:

1. Is Defendant Local 1340 a party to the subject labor agreement?

2. When the Building Trades Council picketed in the instant case, was it acting as the agent of Defendants?

3. Did Plaintiff suffer monetary damages by the picketing of the Building Trades Council and/or by the strike of Defendants and if so, how much?

4. Did Defendants or either of them induce or coerce their members into respecting the Building Trades Council picket line?

5. Did the members of Defendants refuse to perform services for Plaintiff in violation of the collective bargaining agreement?

b. Defendants Contend that the following Issues of Fact are Contested:

1. Does the aforementioned collective bargaining agreement preclude the right of the Carpenter Defendants to honor the picket line of another labor organization?

2. Whether the parties to the aforementioned collective bargaining agreement intended that the disputes involved herein are subject to the dispute resolution procedures provided for in said collective bargaining agreement.

3. Whether the Plaintiff took any steps toward invoking or pursuing the dispute resolutions procedures provided under the aforementioned collective bargaining agreement.

4. To what extent did the Carpenter Defendants cause the damages allegedly sustained by the Plaintiff, and to what extent were said damages caused by other labor organizations?

5. Whether the Building Construction Trades Council is a separate labor organization from the Carpenter Defendants.

6. Whether the decision of the individual carpenter employees not to cross the within picket line constitutes a breach by the Carpenter Defendants of the no-strike provision of the within mentioned collective bargaining agreement.

(B) Contested Issues of Law:

a. The Plaintiff Contends that the following Issues of Law are Contested:

In addition to the issues of law implicit in the foregoing issues of fact, the outstanding issues of law are:

1. As a matter of law, does the action of the Defendants herein constitute a breach of their no-strike, no-picket promises to Plaintiff?

b. The Defendants Contend that the following Issues of Law are Contested:

1. Whether the Colorado Building Construction Trades Council was the agent of the Carpenter Union Defendants as alleged in the Amended Complaint.

2. Whether the picketing of the Colorado Building Construction Trades Council was authorized or ratified by the

Carpenter Defendants, and whether or not the Trades Council acted within the scope of said authority.

3. Whether the picketing of the Colorado Building Construction Trades Council constituted a violation by the Carpenter Defendants herein of the aforementioned collective bargaining agreement.

4. Whether the Carpenter Union Defendants induced, encouraged, or coerced their members into refusing to work for Plaintiff, and if so, whether such conduct constitutes a breach of the aforementioned collective bargaining agreement.

5. Whether the alleged conduct of the Carpenter Defendants caused the cessation or interruption of work complained of, and whether said Defendants are legally responsible for all damages allegedly sustained.

6. Whether Carpenter Defendants attempted to change Article IV, entitled, "Subcontractors," of the aforementioned collective bargaining agreement by the action of the Colorado Building Construction Trades Council in seeking its own collective bargaining agreement from the Plaintiff.

7. Whether the contractual violations alleged by the Plaintiff are disputes within the meaning of Article XIII, entitled, "Contractural Disputes," of the aforementioned collective bargaining agreement, and whether the pursuit of the dispute resolution machinery provided for in Article XIII of said collective bargaining agreement, including participation in an arbitration hearing before an impartial Chairman of the Board of Adjustment is a prerequisite or pre-condition to the Plaintiff's right to sue for breach of said agreement, and whether the Plaintiff's failure to exhaust its contractual remedies bars recovery herein.

8. Whether the dispute resolution machinery provided in Article XIII of the aforementioned collective bargaining agreement is mandatory and exclusive and whether the Plaintiff's failure to invoke said dispute resolution machinery entitles the Defendant Carpenters District Council of Southern Colorado to recover the damages it has sustained as a result of Plaintiff's failure to do so.

9. Whether the exercise of free choice by an individual carpenter employee in regard to the decision of to cross or not to cross the within-mentioned picket line is a breach of the aforementioned collective bargaining agreement, and if so, whether such alleged breach gives rise to a claim for damages against the Defendant Carpenters District Council of Southern Colorado, against Defendant Local 1340 or against both.

10. Whether the Defendant Carpenters District Council of Southern Colorado and/or Defendant Local 1340 are responsible in damages for the acts of the Colorado Building Construction Trades Council which is a separate and distinct labor organization.

11. Whether the Carpenter Defendants as well as their individual employee members are precluded by the aforementioned collective bargaining agreement from honoring the picket line of the Colorado Building Trades Construction Council which is another labor organization.

12. Whether the Plaintiff has mitigated its damages.

13. Whether Plaintiff has failed to join necessary or indispensable parties under the Federal Rules of Civil Procedure No. 19.

14. Whether this Court lacks jurisdiction over the subject matter of this action because it is pre-empted by the National Labor Relations Act as it is amended.

15. Whether or not the Plaintiff has stated a claim upon which relief can be granted.

14. Excerpts from Respondent's Trial Brief (October 1, 1974)

THE MATTER IS NOT ARBITRABLE

Defendant Unions asked the Court to exercise its equity power and order this matter to arbitration. However, the exercise of the Court's equitable powers cannot work to cause irreparable injury. Here for the Court to order arbitration at this late point in the litigation not only causes irreparable injury to Plaintiff Reid Burton Construction Co. because of the time and expense thus far devoted to this cause, but also would cause irreparable injury to the arbitration procedure. The essence of arbitration is that it provides an expeditious treatment of a given problem under a collective bargaining agreement.

The Defendant Unions here have not only engaged in dilatory pleading tactics (see brief previously filed), but have also filed a Counterclaim.

The Second Circuit Court of Appeals in Radiator Specialty Co. v. Cannon Mills, 97 F.2d 318 (C.A. 4, 1938), a case where a counterclaim had been filed and where the defendant had moved to reset the trial to the next term of court, and thereafter moved for a stay pending arbitration, the court stated (at page 319):

"One having the right to arbitrate and to stay an action at

> law, pending arbitration . . . may waive such right . . . Here when the plaintiff chose to ignore the arbitration clause . . . the defendant did not immediately, as was its duty if it intended to rely on the arbitration clause, assert its intention to enforce the arbitration; on the contrary, the defendant appeared and filed an answer to the complaint and set up a counter claim. . . . By its course the defendant waived its right . . . and was in default in proceeding with arbitration."

The Radiator Specialty Co. case has subsequently been cited as precedent in labor disputes. See Simonds Construction Co. v. Local 1330, 315 F.2d 291, 52 LRRM 2645 (C.A. 7, 1963) where the same result was reached and the defendant union had engaged in dilatory pleadings and counterclaims. See also, Lane, Ltd. v. Larus & Brothers Co., 243 F2d 364 (C.A. 2, 1957). Until recently, Defendant Local 1340 was denying it was a party to the collective bargaining agreement. Thus, because of the pleading tactics of Defendant Union, the matter has progressed up to the point of trial and therefore the right to arbitrate, if it ever existed, should be deemed waived.

Secondly, this Court is urged to hold that, by denying that Local 1340 was a party to the collective bargaining agreement, the Union therby repudiated the entire contract (until recently). A union that strikes over an arbitrable issue, thereby repudiates the arbitration agreement of the contract and may be sued directly for damages by the employer. Food Fair Stores, Inc. v. Amalgamated Butcher Workmen Local 641, et al., ——— F.Supp. ——— (D.C. Colo. 1971); Drake Bakeries, Inc. v. Local 50, American Bakery and Confectery Workers International, 370 U.S. 254, 50 LRRM 2440 (1962). It naturally follows that where a union repudiates an entire contract, the employer's duty to arbitrate is surely waived.

Thirdly, the grievance and arbitration clause herein is designed, by its very language, only for the processing of employee grievances. See G. T. Schjeldahl Co. v. Local 1680, IAM, 393 F.2s 502, 67 LRRM 3042 (C.A. 1, 1968) and particularly Food Distributors, Inc. v. Local 229, 483 F.2d 418, 84 LRRM 2043 (C.A. 3, 1973), wherein the grievance and arbitration language was very similar to the case at bar. Under that language, the court held that the grievance and arbitration procedure was not designed to handle an employer's grievance (copy of case attached). It was there held that an employer was not bound to arbitrate its damage claim against the union for breach of a no-strike clause where the grievance procedures specified that a dispute would first be taken up by a union steward with management. To hold that the parties intended that a company official would refer an employer grievance to a union steward would result in a "strained construction."

15. Respondent's Reply to Counterclaim (December 5, 1973)

COMES NOW the Plaintiff, Reid Burton Construction, Inc., by its attorneys, Law Offices of Robert G. Good, and in response to Defendants' Counterclaim avers as follows:

FIRST DEFENSE

The allegations of Defendants' Counterclaim do not state a claim upon which relief can be granted.

SECOND DEFENSE

As a further defense to Defendants' Counterclaim, Plaintiff affirmatively alleges that Defendants have waived any right they may have to make the instant Counterclaim and Defendants are thereby estopped from doing so by their conduct.

THIRD DEFENSE

As a further defense to Defendants' Counterclaim, Plaintiff affirmatively alleges that Defendants' Counterclaim is barred by its failure to submit the subject matter of its Counterclaim to the contractual disputes machinery set forth in Article 13 of the collective bargaining agreement in effect between Plaintiff and Defendants.

FOURTH DEFENSE

As a further defense to Defendants' Counterclaim, Plaintimm affirmatively alleges that Defendants' Counterclaim, on its face, alleges and admits that the subject matter of Defendants' Counterclaim involves a question as to the application or interpretation of the applicable collective bargaining agreement and thus the Court is without jurisdiction over the subject matter of Defendants' Counterclaim.

FIFTH DEFENSE

As a further defense to Defendants' Counterclaim, Plaintiff affirmatively alleges that Defendants' Counterclaim is barred by the application of the doctrine of laches.

SIXTH DEFENSE

That Defendant Carpenter's District Council of Southern Colorado has failed to join as a party Local 1340 of the International Brotherhood of Carpenters and Joiners of America, AFL-CIO, a necessary or indispensible party needed for just adjudication as required by the provisions of Rule 19 of the Federal Rules of Civil Procedure.

SEVENTH DEFENSE

As a further defense to Defendants' Counterclaim, Plaintiff Reid Burton Construction, Inc., avers as follows:

1. Plaintiff admits the allegations contained in paragraph one of Defendants' Counterclaim.

2. Plaintiff admits the allegations contained in paragraph two of Defendants' Counterclaim.

3. Plaintiff admits the allegations contained in paragraph three of Defendants' Counterclaim.

4. Plaintiff admits the allegations contained in paragraph four of Defendants' Counterclaim.

5. Plaintiff admits the allegations contained in paragraph five of Defendants' Counterclaim insofar as it alleges that Plaintiff is a party to a collective bargaining agreement. Plaintiff affirmatively alleges that the parties to said collective bargaining agreement are the Plaintiff and the Carpenter's District Council of Southern Colorado and its affiliated Local Unions, including Local 1340. Plaintiff further affirmatively alleges that said collective bargaining agreement is also known as Carpenter's Agreement, Carpenter's District Council of Southern Colorado."

6. Plaintiff admits the allegations contained in paragraph six of Defendants' Counterclaim insofar as it alleges that Article 13 of said collective bargaining agreement is entitled "Contractural Disputes." As to the remainder of the allegations contained in paragraph six of Defendants' Counterclaim, Plaintiff

shows the Court that said allegations are conclusions of the pleader and are, therefore, denied.

7. Plaintiff admits the allegations contained in paragraph seven of Defendants' Counterclaim insofar as it alleges that Plaintiff Reid Burton's Amended Complaint alleges violations of Article 13 and 4 of the collective bargaining agreement by the Carpenter's District Council of Southern Colorado. To the extent that paragraph seven of Defendant's Counterclaim inaccurately paraphrases and summarizes Plaintiff's Amended Complaint said allegations are denied. As to the remainder of the allegations contained in paragraph seven of Defendants' Counterclaim, Plaintiff Reid Burton shows the Court that said allegations are conclusions of the pleader and are therefore denied.

8. Plaintiff Reid Burton is without sufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in paragraph eight of Defendants' Counterclaim and therefore denies the same. By way of further answer, Plaintiff Reid Burton shows the Court that said allegations are conclusions of the pleader and are therefore denied.

9. Plaintiff Reid Burton denies each and every allegation contained in paragraph nine of Defendants' Counterclaim.

10. Plaintiff Reid Burton denies each and every allegation contained in paragraph ten of Defendants' Counterclaim.

11. Plaintiff Reid Burton Construction, Inc., denies all allegations contained in Defendants' Counterclaim that herein are not specifically admitted.

WHEREFORE, having fully answered Defendants' Counterclaim, Plaintiff prays that the Counterclaim be dismissed in its entirety and that Plaintiff be awarded judgment for its costs, including reasonable attorney's fees, together with such other and further relief as the Court deems appropriate.

APPENDIX D

GRIEVANCE AND ARBITRATION PROVISIONS OF APPLICABLE COLLECTIVE BARGAINING AGREEMENT

CARPENTERS' BUILDING CONSTRUCTION 1972-1975 AGREEMENT

CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO

ARTICLE XIV
CONTRACTURAL DISPUTES

Section 1. – In the event that a dispute arises involving the application or interpretation of the terms of this agreement, reasonable and diligent effort shall be exerted by the employee with the employer's representative, the employee contacting the business representative through the steward, and/or the business representative with the employer's representative. If the two parties are unable to reach a settlement, the dispute shall be reduced in writing and the aggrieved party shall notify the other party the dispute is being referred to a Board of Adjustment.

Section 2. – The Board of Adjustment shall be composed of two representatives selected by the employer from contractors signatory to this agreement and two representatives selected by the union. The Board of Adjustment shall meet not later than five (5) working days after a grievance has been presented to it.

Should the Board of Adjustment be unable to render a majority decision after convening and hearing the dispute, the

Board shall, within 48 hours, select an impartial chairman who is not directly connected with the building or construction industry, either as contractor or union. Should the parties be unable to agree on the selection of the chairman within said 48 hours, the same shall be selected from a panel of five (5) names submitted by the director of the Federal Mediation and Conciliation Service in Washington, D. C. The party initiating the dispute shall strike first on said list.

Section 3 – The majority decision of the Board of Adjustment shall be final and binding upon each party to the dispute in each instance and shall be within the scope and the terms of this agreement.

The decision of the Board of Adjustment shall be rendered within five (5) regular working days after the selection of the impartial chairman and the hearing of the dispute before the Board of Adjustment.

Any expense incurred by engaging an impartial chairman shall be borne equally by the parties to the dispute.

The parties intend that all meetings of the Board of Adjustment shall be conducted by such rules of procedure as will ensure they are nonadversary and nonadjudicatory in nature. The Board of Adjustment shall, in each case, determine the rules of procedures for each dispute.

Section 4. – The Board of Adjustment is empowered to hear and decide disputes growing out of the interpretation and application of this agreement and shall not engage in negotiations for changes or amendments to this Agreement, wage rates, hours of work or working conditions.

Section 5. – The parties agree there shall be no strike, work stoppage, slowdown, lockout or other interruption of the continuity of the work in progress during the life of this Agreement unless a party refuses to abide by or to implement the majority decision of the Board of Adjustment.

Any party to this Agreement who fails to abide by or refuses to adjust a dispute by the terms of this Article shall be in violation of this Agreement, and any other party or parties may take such appropriate economic action as deemed necessary against such person or parties.

Section 6. – Time limits stated in this Article may be extended by mutual consent of both parties.

Section 7. – Exempted from the foregoing provisions on disputes and specifically exempted are disputes involving the discharge of a union steward and failure to pay into the various fringe benefit funds provided for in Articles XIV, XV, XVI, and XVIII.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. C-5184

REID BURTON CONSTRUCTION, INC., a Colorado corporation, Plaintiff, vs. CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, LOCAL 1340 of The INTERNATIONAL BROTHERHOOD OF CARPENTER AND JOINERS OF AMERICA, AFL-CIO, COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL, unincorporated associations and labor organizations. Defendants.	MEMORANDUM OPINION

This hoary case is ready for decision again. November 19, 1974, I thought I had touched all bases in a way which would decide the case whether I was right or wrong on the difficult questions of law presented. I had earlier dismissed Colorado Building and Construction Trades Council, (a dismissal which was not appealed) and, as to the other two defendants, I said that I was convinced that each had violated a no-strike clause of their contract with plaintiff. I also said that I was con-

vinced that plaintiff sustained damage, and I fixed the damages at $6,392.52 on the "Markley Motors job," and $4,409.45 on the "Everitt job." All of this is explained in my earlier opinion, and it need not be repeated here. The predictable appeal which followed didn't question the finding of contract breach or damages. It argued only jurisdiction.

In my November, 1974, opinion, I have said, "Having found that defendants broke their promise not to strike and having found the amount of damages resulting to plaintiff as a result of defendants' breach of contract, I must face up to the question of whether I have jurisdiction to enter judgment against defendants. To do this, I must decide whether the arbitration clause covers the dispute and makes arbitration mandatory. Then, I must decide whether because of waiver, repudiation, estoppel, laches or any other reason, the matter should not be sent to the arbitrator." After analyzing *Drake Bakeries v. Bakery Workers,* (1962) 370 U.S. 254, and *Atkinson v. Sinclair Refining Co.,* (1962) 370 U.S. 238, I concluded that the question was one covered by the arbitration clause. I added that althought I didn't like the result, and although I personally agreed with Justice Powell's dissent, I thought that *International Union of Operating Engineers Local 150 v. Flair Builders,* (1972) 406 U.S. 487, precluded me from deciding and forced me to let the arbitrator decide whether defendants' conduct estopped them from insisting on arbitration or whether they had waived their right to arbitration. [I think that it was pretty clear in that opinion what I wanted to hold.] The Court of Appeals said that I was right in holding that the basic question was covered by the arbitration clause, but it said that I was wrong in holding that I was bound by the result in *Flair Builders* which I thought required the conclusion that equitable questions were for an arbitrator to decide. Chief Judge Lewis distinguished *Flair Builders* saying:

"In sum we conclude that the enumerated equitable defenses discussed are, in general, mandated by Flair Builders to the arbitrator for determination of the continued vitality of the contractual arbitration process. However, if such defenses arise solely during the course of the judicial process the arbitrator is not the one to determine whether the judicial process has been abused by either party or at all or whether an equitable defense to the main dispute has been established during the course of the judicial trial by in-trial conduct."

Defendants asked for certiorari, but the Supreme Court refused to accept the case. Upon receipt of the remand, I made inquiry as to whether any party wanted to take more testimony, and all parties notified the court in writing that additional evidence was not desired. It was agreed that the case would be decided on the record made, and a briefing schedule was agreed to. The last brief was filed April 1, 1977, and the case is ready for me to try once more for final disposition.

Without rehashing all that has been said before, I incorporate by reference the facts found in my earlier opinion, and I repeat that I take a dim view of defendants' whirlygig positions during the course of the litigation. As I shall explain presently, I think that advertently or inadvertently the court and plaintiff's counsel were led down a primrose path by a failure on the part of defendants' counsel to communicate to the court and opposing counsel in a timely way the argument of defendants that the dispute was one subject to arbitration. These are some of the things which led up to setting a case for trial and trying a case which was subject to arbitration unless, as phrased by Chief Judge Lewis, "the unions should be prevented from demanding arbitration because of 'evasion' and 'dilatory' pleading practices before the court." After relating

some of the 180 degree course changes by defendants, I said in my opinion of two and a half years ago that "sophistry such as this does not help a court in its futile efforts to keep up with an over-crowded docket." I haven't changed my mind, and I am sure that it comes as no surprise to anyone that now the Court of Appeals has said that I have jurisdiction to do so, I unhesitatingly hold that the unions are "prevented from demanding arbitration because of 'evasive' and 'dilatory' pleading practices before the court." Here are a few of the reasons why: —

Plaintiff filed an original and an amended complaint. Both pleaded that plaintiff and the two defendants "were parties to a collective bargaining agreement," and that the agreement "governed the relationship" between plaintiff and defendants. The defendants answered the original complaint and they answered the amended complaint. Both answers denied that either defendant was a *party* to the agreement, and it was denied that the agreement governed their relationship. They did not admit anywhere in these pleadings that they were "bound" by the agreement and they did not say they would be subject to or that they would live by an arbitrator's decision. The complaint was filed July 13, 1973, and it was but three days short of a year thereafter that the defendant Local first said that it was *"bound"* by the contract, even though it was not a *"party"* to a contract which did not "govern the relationship" of the litigants. I repeat what I said November 19, 1974, after everyone's efforts and time had been expended in getting the case to trial:

> "Defendants argue that they have not changed their position, and they explain that the time spent by plaintiff's counsel and the court in preparing the case for trial was wasted time because plaintiff's counsel and the court

should have read more literally defendant's assertions that Local 1340 was not a *party* to the contract and should not have been taken aback by defendant's July 10, 1974, assertion that the non-party local was *bound* by a contract to which it is not a *party, and this even though defendants had denied that they were governed by the agreement.*"

Defendants must be students of Lewis Carroll, because, as was said in *Through the Looking Glass*:

> "' When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'
>
> "'The question is,' said Alice, 'whether you can make words mean so many different things.'
>
> "'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'"

Defendants' reasoning escapes me. They say that they are non-parties to a contract but that they are "bound" by a contract to which they aren't a party. I know about third-party-beneficiaries of a contract, but the concept of "third-party-obligors" is new to me.

In more detail, the history of the case is that the first complaint was filed July 13, 1973, and, as I have said, it pleaded that the plaintiff and defendants were parties to a collective bargaining agreement and that the agreement "governed their relationship." Defendants moved to dismiss, but the motion and brief supporting it did not raise the question of whether there was a binding arbitration agreement. The slightest mention of *Boys Market, Inc. v. Retail Clerks Union,* (1970) 398 U.S. 235, *Gateway Coal Co. v. Mineworkers Union,* (1974) 414 U.S. 368, the *Steel Trilogy cases,* or any of countless other cases

would have led immediately to *Drake Bakeries v. Bakery Workers,* (1962) 370 U.S. 254, and *Atkinson v. Sinclair Refining Co.,* (1962) 370 U.S. 238, and the lawsuit would have been all over at that point if defendants had then suggested that there was an agreement to arbitrate, binding on both parties. The jurisdictional question was available to defendants on motion to dismiss – in fact that is the way it is typically raised – but defendants argued for dismissal on unrelated grounds without mention of any contention that I should order arbitration of a contract dispute by a non-party to the agreement.

The amended complaint asked for no injunction but in other respects it was the same as the first complaint. Once more, defendants moved to dismiss, but neither the motion nor the brief in support gave any clue that defendants thought there was a *Boys Market* problem, and the thought surely didn't occur to me. Again, defendants gave no hint that they wanted me to order arbitration.

November 9, 1973, defendants answered. Paragraph 5 of the amended complaint is the paragraph which said that defendants were parties to the agreement and that it governed their relationship. Defendants denied the averments of paragraph 5, and they *affirmatively pleaded* that the District Council was a party to the agreement, but that "*Defendant Local 1340 is not a party* to the aforementioned collective bargaining agreement." It is true that the answer said that Burton had failed to exhaust the contractual remedies and defendants said that Burton had violated the agreement by not seeking arbitration, but there was no claim made that the court was without jurisdiction because the parties were contractually bound to arbitrate – and under defendants' then position the Local wasn't a party to the contract nor was there suggestion of the "third-party-obligor" concept. Nowhere was there any sugges-

tion that defendants were either parties to the agreement or that the Local was "bound" by it. Had the Local taken this position at that time, and had it said that there was an arbitration agreement binding on everyone in the lawsuit, a summary judgment motion would have been granted with all convenient speed. Defendants didn't move for summary judgment, and they let the case crawl towards a trial. A reply to the counterclaim was filed directed to the claim of contract violation by Burton, and, once more, *plaintiff said* that the defendants were both *parties* to the agreement. The reply was filed December 5, 1973, and three months later the defendants filed an amended answer which, all over again, did not admit that the Local was a party to the contract nor did it suffice to clue me in on the idea that the Local was "bound" by a contract to which it was not a party and which didn't govern the relationships between the parties.

The same day the amended answer was filed, all parties filed pretrial statements. Plaintiff listed as the first contested issue of fact:

> "1. Is Defendant Local 1340 a party to the subject labor agreement?"

Defendants statement said, inter alia:

> "The Defendant Carpenters District Council of Southern Colorado is a party to the aforementioned collective bargaining agreement with the plaintiff . . .Furthermore, the *defendant Local 1340 is not a party* to the aforementioned collective bargaining agreement with the plaintiff. . . . It is the defendant Carpenter Union's position that these two alleged violations of the collective bargaining agreement are clearly disputes involving the interpretation and appli-

> cation of said collective bargaining agreement and, therefore, the resolution of these disputes lies solely and exclusively within the province of the dispute resolution machinery contained in Article XII of said collective bargaining agreement. Thus this court has no jurisdiction over the subject matter of the action. . . ."
>
> [I concede that careful study of this statement could alert a suspicious person, but plaintiff's counsel and I didn't react to the double talk.]

And, although plaintiff said that the fact was controverted, *defendants said* in their pretrial statement that an "uncontroverted fact" was,

> "*Defendant Local 1340 is not a party* to the aforementioned collective bargaining agreement, whereas Carpenters District Council of Southern Colorado is a party to said agreement."

For sure, defendants acquiesced in setting the case for trial, and their pretrial statement cheerfully estimated the length of trial to be held in this court.

It is to be remembered that as was emphasized in *Boys Market, Sinclair Refining Co. v. Atkinson,* (1962) 370 U.S. 195, insists that arbitration agreements under no-strike clauses will be enforced only if the dispute involves "a grievance which both parties are *contractually bound to* arbitrate." I say again, that although defendants have no problem with non-parties being "contractually bound," I am challenged by the concept, and no such thought came to mind as long as defendants were arguing that the Local wasn't a *party* to the contract.

". . . the Red Queen said to Alice, 'Always speak the truth

– think before you speak – and write it down afterwards.'

" 'I'm sure I didn't mean –' Alice was beginning, but the Red Queen interrupted her impatiently.

" 'That's just what I complain of! You *should* have meant!"

.....

" 'She's in that state of mind,' said the White Queen, 'that she wants to deny *something* – only she doesn't know what to deny!"

It was on July 18, 1974, that defendants decided what they wanted to admit and what they wanted to deny, because that day they filed a "Suggestion to dismiss." It was supported by a brief which said, "Although heretofore the defendants have questioned whether the Defendant Local 1340 was a party to the collective bargaining agreement entered into by Reid Burton and the Carpenters District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreement." Here was the first suggestion of expansion of third-party-beneficiary principles to third-party-obligors, but if defendants' true position wasn't crystal clear as of July 18, 1974, when it filed its "Suggestion to dismiss," the clarity of defendants' thinking was further obfuscated by its *amended pretrial statement filed five days* after the "Suggestion to dismiss":

". . . the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with the plaintiff,"

and that same day plaintiff's amended pretrial statement listed as an issue the question of whether the local was a party to the agreement. This brought the matter to a head, and defendants were asked to explain in words even the court could understand just what their position was. This is the explanation:

"Defendants' position is simply that, although Local 1340 is not a party to the agreement, it is bound by the substantive terms of the agreement."

This, defendants said, deprived the court of jurisdiction, but defendants made no offer to obtain nor did they agree to submit to binding arbitration. In the words of *Sinclair*, defendants admission that the Local (a non-party to the contract) is "bound" by the agreement's substantive terms, is not to me an all out admission that the Local was "contractually bound to arbitrate."

On this queasy record the case went to trial on October 1, 1974, and I was astonished to find out that defendants wanted me to issue a mandatory *Boys Market* type injunction ordering plaintiff to arbitrate. The record shows my surprise:

"THE COURT: Now tell me, when do you say you first requested that I, by mandatory injunction, order plaintiff to arbitrate? I must question that. I have difficulty in reading your pleadings, so tell me where and when you first requested that mandatory injunctive relief?

"DEFENSE COUNSEL: When requested to do so today, your honor.

"THE COURT: All right. That's what I thought. . . Is it possible . . . put very inartfully . . . that the defendants really didn't want arbitration until their feet got right in the fire?"

The answer by counsel wasn't very helpful to me. Accordingly, because of the time already invested in the case and because of my then thinking that defendants shouldn't be permitted to frustrate the judicial process at that late date, I went

ahead with the trial. [No one had called *Flair Builders* to my attention at time of trial, and it was with chagrin that I read it post trial. I only wish that I had thought of the analysis of it made by the Court of Appeals, because I surely hated to go along with what I thought it said.[

I do not say that there was conscious misrepresentation on the part of counsel. I think that the pleadings were hastily drawn and perhaps counsel didn't really face up to the lawsuit until the eve of trial. I say this to emphasize that I think that the unfortunate results may have been largely inadvertent rather than intentional, but the impact on the court and on plaintiff were the same no matter what the intent of defense counsel. The pleadings and briefs filed for defendants were evasive and dilatory, and whether they were so because of intent or as a result of negligence, plaintiff and the court were lulled into a belief that defendants wanted the court to try the lawsuit, and that's what the court did. I must confess that as I think back on the farce of the union's claim that there was no "strike" and their claim that there was only "voluntary individual action," and when I recall the remarkable coincidence of immediate punitive action against two carpenters who didn't "voluntarily stay from work," I am unconvinced that the union's conduct was pristine. When union members who live in Longmont, Colorado, who don't "voluntarily stay away from work," in Fort Collins, Colorado, are ordered to stand union trial in Montrose, Colorado, and when they are swiftly convicted and fined by the union because of their failure to "voluntarily stay home," it strains credulity to think that there wasn't just a little malice aforethought.

I am sure that the record in this case demonstrates that the conduct of defendants *in this case in this court* establish the equitable defenses to arbitration mentioned by Chief Judge

Lewis, and I so hold. The unions played games with plaintiff and the court too long to now insist on an injunctive order requiring plaintiff to arbitrate this stale dispute.

The rest is easy, and to the best of my knowledge it wasn't attacked on appeal. November 19, 1974, before reaching the question of whether I had jurisdiction under *Drake*, *Sinclair* and *Flair*, I found factually:

> "The record in this case convinces beyond peradventure that Carpenters District Council of Southern Colorado violated the no strike clause of the labor contract to which it was a party and that Local 1340 of the International Brotherhood of Carpenters & Joiners of Amercia, AFL-CIO violated the same provision of the same contract which the local has not judicially admitted was binding on it. The defendants flagrantly violated the contract jointly and severally.
>
> "Plaintiff sustained damage as a result of those violations. The fact of damage is certain, although the amount of damage is somewhat less certain. Defendants did not controvert the damage testimony and the record made in this case permits a finding, and I find that as a result of defendants' contract violation, plaintiff was damaged in the amount of $6,392.52 on the Markley Motors job and in the amount of $4,409.45 on the Everitt job. The plaintiff was damaged in the total amount of $10,801.97 as a direct and proximate result of defendants' flagrant violations of the contract's provisions."

Judgment shall enter in favor of plaintiff and against de-

fendants in the amount of $10,801.97, plus interest and costs as permitted by law.

Dated this 18th day of April, 1977.

s/Fred M. Winner
United States District Judge

APPENDIX F

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

REID BURTON CONSTRUCTION, INC., a Colorado corporation,	)	
Plaintiff-Appellee,	)	
v.	)	
	)	NO. 77-1458
CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, and LOCAL NO. 1340 of the UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO	)	
Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. C-5184)

Robert I. Cohn, Denver, Colorado (Robert G. Good and Martin Semple of Good and Stettner, Denver, Colorado, were on the brief) for Plaintiff-Appellee

John W. McKendree (McKendree & Lubin, Denver, Colorado, were on the brief) for Defendants-Appellants

Before HOLLOWAY, DOYLE and LOGAN, Circuit Judges
HOLLOWAY, Circuit Judge

This appeal brings before us for the second time a dispute involving alleged breach of the no-strike clause of a collective bargaining agreement, asserted as a §301 suit under 29 U.S.C. §185, between plaintiff Reid Burton Construction, Inc. (Burton), and defendants Carpenters District Council of Southern Colorado (District Council) and Local 1340 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Local 1340 or Local).

I

The relevant facts are as follows. The complaint (II R. 1-6), filed July 13, 1973, and the amended complaint (II R. 73-77)[1] based jurisdiction on Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185,[2] and in paragraph 5 alleged that defendants were parties to the collective bargaining agreement and that the agreement governed the relationship between the parties. Following denial of their motions to dismiss,[3] defendants on November 9, 1973, filed an answer[4] in which they denied the allegations of paragraph 5,

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[1]The complaint and the amended complaint were identical, except that the latter deleted plaintiff's request for injunctive relief.

[2]Section 185(a) of Title 29, U.S.C. provides:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[3]These motions were filed in response to plaintiff's complaint and amended complaint and were denied on October 26, 1973. (IR. 115). On November 23, 1973, another defendant, Colorado Building and Construction Trades Council (Trades Council), was dismissed from the suit. (I R. 84, 115; II R. 138-39; III R. 307).

[4]Though defendants later amended their answer, the changes did not relate to the issue presented in this appeal.

stating that District Council was party to an agreement with plaintiff but that Local 1340 was not a party. The answer also asserted the contract's arbitration clause as a bar to plaintiff's action and as the basis of a counterclaim for breach of the agreement and damages.[4a]

Defendants maintained this position throughout pretrial and discovery proceedings. *See generally* I. R. 115-116. On July 18, 1974, they filed a Suggestion to Dismiss, stating that the pleadings and depositions on file showed on their face "that the controversy described therein is one within the exclusive jurisdiction of an arbitrator" under the contract's arbitration clause. In the brief supporting this suggestion defendants conceded that Local 1340 was subject to the agreement's terms and that Local "would be bound by an arbitral award" issued in accordance with them. But defendants made no motion to stay the court proceedings (*see* Brief of Appellants at 29 n.25), and no motion for an order directing plaintiff to arbitrate.[5] Their apparently changed position was "further ob-

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[4a]Defendants in their answer also pleaded an Eighth Affirmative Defense (II R. 126) in which they stated that:

> The defendants. . ., without waiving their contention that the interpretation and application of the provisions of the aforementioned collective bargaining agreement is within the sole and exclusive province of the disputes resolution machinery agreed to therein, assert that they have neither waived their right, nor the right of the employees they represent, to honor a picket line established by another labor organization.

[5]With respect to whether plaintiff Burton was misled into thinking the defendants would not ask for an order for arbitration, a point discussed further below, we note that in a written reply on August 2, 1974, to the defendants' Suggestion to Dismiss, plaintiff Burton did criticize the defendants' termerity at that late hour to suggest that "the court cannot further proceed in this action *and must order arbitration.*" (III R. 210). (Emphasis added). However, the Suggestion itself and the exchanges between the parties dealt mainly with the request to dismiss the action and the defendant's Suggestion and brief do not actually seek an order for arbitration.

fuscated," the trial judge said (I R. 91); the judge noted that five days later in their amended pretrial statement defendants pleaded that "the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with plaintiff." (I R. 91).

The case proceeded to trial on October 1, 1974. During trial, defense counsel questioned Mr. Burton to establish the point that he had not sought arbitration under the contract. The court then asked defense counsel if he would agree that he would arbitrate the question of damages and be bound by it, and counsel so agreed. The judge then referred to the loss of time and expense to the parties and loss of the court's time. (IV R. 49-51). Counsel further responded to questions by the court that defendants did demand arbitration, and that arbitration should be ordered under *Boys Market, Inc. v. Retail Clerks Union*, 398 U.S. 235. (*Id.* at 111).

Later in the trial in response to further questioning by the court defense counsel admitted that he first requested, by mandatory injunction, an order for plaintiff to arbitrate "when requested to do so today." (IV R. 140.) Defense counsel maintained, however, that defendants' position since filing of the answers had been that the appropriate forum was arbitration. (*Id.* at 142).

Because of the time already invested in the case and because of his view that defendants should not be permitted to frustrate the judicial process at that late date, the judge went ahead with the trial. During the trial, evidence was presented on the issues of breach of the no-strike clause, damages, various defenses and the relationship of the union organizations.

Subsequently, the trial judge issued the original opinion in which he held, *inter alia*, that the dispute itself was arbitrable.

(III R. 314). In addition, relying on *Operating Engineers Local 150 v. Flair Builders*, 406 U.S. 487 (1972), he held that the preliminary question whether defendants had not waived their right to arbitration by "evasive and dilatory" brief and pleading tactics in the district court should properly be decided by an arbitrator. (*Id.*). He ordered a stay of the district court proceedings, then later, upon plaintiff's motion, dismissed the suit altogether so that plaintiff might perfect an appeal. (III R. 315, 320).

In the first appeal, see *Reid Burton Construction v. Carpenters District Council of Southern Colorado*, 535 F.2d 598, *cert. denied*, 429 U.S. 907 (1976), we upheld the trial court's determination that the dispute was properly arbitrable under the terms of the contract, but found that when the actions premising plaintiff's equitable defense to defendants' asserted arbitration right occurred solely before the court, it was improper to have given the arbitrator the equitable preliminary issues to decide. Accordingly, we remanded the case to the district court for determination of whether defendants, by evasive and dilatory pleading practices before that court, were prevented from asserting any right they may have had to arbitration.[6]

---

[6]In that first appeal we stated (535 F.2d at 604):

> It is entirely appropriate in some instances for a district court to retain section 301 jurisdiction of an arbitrable dispute where, because of conduct before the court, it may be deemed that a party is prevented on the basis of some equitable principle from asserting a right to arbitration. Whether the instant case is one such instance has not been decided. Therefore, we remand this case for such a determination. If the district court finds that there has been no estoppel or waiver because of the union's conduct in pleading, then it is proper to order arbitration of the underlying dispute — the alleged violation of the no-strike clause. If on the other hand it is determined that the unions have waived their right to arbitration, or in some other way should be prevented from asserting this right, because of conduct which falls within the con-

On remand the district court found that defendants' conduct in court established an equitable defense to defendants' arbitration right and entered judgment for plaintiff for the predetermined[7] $10,801.97 in damages, plus interest and costs. Reiterating his views that he took a "dim view of defendants' whirlygig positions during the course of the litigation" and that "such sophistry as [defendants'] does not help a court in its futile efforts to keep up with an overcrowded docket," the district judge found that "advertently or inadvertently the court and plaintiff's counsel were led down a primrose path by a failure on the part of defendants' counsel to communicate to the court and opposing counsel in a timely way the argument of defendants that the dispute was one subject to arbitration." (I R. 86). Having found that "*defendants acquiesced in setting the case for trial*" and that "their pretrial statement cheerfully estimated the length of trial to be held" (I R. 90), the court noted that even after their suggestion to dismiss "defendants made no offer to obtain nor did they agree to submit to binding arbitration." (I R. 92) (Emphasis added).

Though observiing that "the unfortunate results may have been largely inadvertent rather than intentional" (I R. 93), the court found that the "impact on the court and on plaintiff were

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trol of the court, then the district court can properly proceed to the merits of the underlying dispute.

In sum we conclude that the enumerated equitable defenses discussed are in general, mandated by *Flair Builders* to the arbtrator for determination of the continued vitality of the contractual arbitration process. However, if such defenses arise solely during the course of the judicial process the arbitrator is not the one to determine whether the judicial process has been abused by either party or at all or whether an equitable defense to the main dispute has been established during the course of the judicial trial by in-trial conduct.

[7]The trial judge had already made findings on damages before the first appeal. (See III R. 312-13). These findings are not challenged in the second appeal.

the same no matter what the intent of defense counsel. The pleadings and briefs filed for defendants were evasive and dilatory, and whether they were so because of intent or as a result of negligence, plaintiff and the court were lulled into a belief that defendants wanted the court to try the lawsuit, and that's what the court did." (*Id.*).

Finally, noting that "[t]he unions played games with plaintiff and the court too long to now insist on an injunctive order requiring plaintiff to arbitrate this stale dispute," the court concluded that "the record in this case demonstrates that the conduct of defendants *in this case in this court* establish the equitable defenses to arbitration mentioned by Chief Judge Lewis." (*Id.*).

This timely appeal follows, and we focus mainly on the findings and the holding against defendants' right to arbitration.

II

In urging reversal of the district court, defendants argue that they did not waive their right to assert the arbitration defense either by not moving for a stay or by participating in the litigation. More specifically, defendants contend that they raised their arbitration defense in a timely and proper fashion and without intentional misrepresentation of Local 1340's contract status; that the initial denial of Local's party status was made in good faith; and that, in any event, Burton has suffered no prejudice from the delay in demanding arbitration. Mere delay, they say, does not constitute waiver, absent such a showing of prejudice; defendants were not obligated to move for a stay; and the mere filing of a counter-claim does not waive the defense.

Defendants further contend that since alternative pleading is proper, a party need not rely exclusively upon the arbitration provisions of the contract, but may also seek damages for breach in the same action. It is not the inconsistency or apparent inconsistency of these pleadings, but rather any prejudice flowing therefrom, which determines the waiver issue. Thus "the counterclaim, rather than abandoning the arbitration defense, underscored its presence as an important element in the action."

We cannot agree that these points call for reversal of the trial court's findings. Generally, the parties to a contract can agree to settle disputes arising thereunder by arbitration. Indeed, the federal policy is to promote industrial stabilization through the collective bargaining agreement, and a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the agreement. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578. However, the right to arbitration, like any other contract right, can be waived. *Cornell & Company v. Barber & Ross Company*, 360 F.2d 512, 513 (D.C.Cir.), *aff'g.*, 242 F. Supp. 825 (D.D.C.). There is no set rule as to what constitutes a waivier or abandonment of the arbitration agreement; the question depends upon the facts of each case and usually calls for a finding by the triers of the facts. *Burton-Dixie Corp. v. Timothy McCarthy Const. Co.*, 436 F.2d 405, 408 (5th Cir.).

In determining whether a party to an arbitration agreement, usually a defendant, has waived its arbitration right, federal courts typically have looked to whether the party has actually participated in the lawsuit or has taken other action inconsistent with his right, *Cornell & Company v. Barber & Company, supra*, 360 F.2d at 513; whether the litigation machinery has been substantially invoked and the parties were

well into preparation of a lawsuit by the time an intention to arbitrate was communicated by the defendant to the plaintiff, *Cornell & Company*, 242 F.Supp. at 826 (D.C.C.), *aff'd*, 360 F.2d 512; whether there has been a long delay in seeking a stay or whether the enforcement of arbitration was brought up when trial was near at hand, *General Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924, 928 n.4 (5th Cir.); *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 413 (2d Cir.), *cert. dismissed*, 364 U.S. 801; *American Locomotive Co. v. Chemical Research Corp.*, 171 F.2d 115, 121 (6th Cir.), *cert. denied*, 336 U.S. 909; *E.T.Simonds Const. Co. v. Local 1330 of Int. Hod Carriers, etc.*, 315 F.2d 291 (7th Cir.); *Radiator Specialty Co. v. Cannon Mills*, 97 F. 2d 318 (4th Cir.)

Other relevant factors are whether the defendants have invoked the jurisdiction of the court by filing a counterclaim without asking for a stay of the proceedings, *American Locomotive Co. v. Chemical Research Corp., supra*, 171 F.2d at 121; *Radiator Specialty Co. v. Cannon Mills, supra*, 97 F.2d at 319; *Hilti, Inc. v. Oldach*, 392 F. 2d 368, 370-71, 372 n.9 (1st Cir.); whether important intervening steps [*e.g.*, taking advantage of judicial discovery procedures not available in arbitration, *see Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 n.7 (2d Cir.)] had taken place, *Kulukandis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 989 (2d Cir.); and whether the other party was affected, misled, or prejudiced by the delay, *Kulukandis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d at 989; *Local 198, United Rubber, C. L. & P. Wkrs. v. Interco, Inc.* 415 F.2d 1208, 1211-12 (8th Cir.); *Carcich v. Rederi A/B Nordie, supra*, 389 F.2d at 696.

In *Burton-Dixie, supra*, the Fifth Circuit confronted the waiver issue in a context substantially similar to the present

one. There defendant in its answer did not ask the court to stay proceedings pending arbitration, but rather denied liability, set up as an affirmative defense plaintiff's failure to arbitrate, impleaded two third-party defendants, and proceeded to litigate the substantive dispute. The court concluded that the factfinder (there a jury) could reasonably find that defendant waived its right to insist on arbitration. *Id.*, 436 F.2d at 409; *see also American Locomotive, supra*, at 115.

Viewed against the above principles and decisions, we cannot say that the finding of waiver by defendants District Council and Local 1340 was clearly erroneous. We note the initial and consistent denial for one year of Local's status as a party; the ambiguous or confusing ultimate stance on this point; defendants' participation in numerous hearings, pretrial conferences, motions and other pleadings, and the deposing of witnesses; and their assertion of the arbitration clause merely as a defense in bar and a counterclaim, without insisting upon or demanding immediately, as was their duty, *see Radiator Specialty*, 97 F.2d at 319, enforcement of that provision.

Among other things, the defendants-appellants argue that there was no prejudice to Burton resulting from their actions in court. While it is true that the trial court made no specific finding of prejudice, the sum and substance of those findings as a whole is one of prejudice and detriment to Burton. Admittedly it was not until the day of trial when mandatory injunctive relief was requested by defendants, which clearly signaled their position that they desired the decision of an arbitrator instead of the court. The preparations until that time for trial in the court do, in our opinion, amount to sufficient prejudice that it is inequitable for a party at that point to shunt the controversy over to the arbitration procedures. See *Amer-*

ican Locomotive Co. v. Chemical Research Corp., supra, 171 F.2d at 121.[8]

The findings of the trial court on the defendants' conduct must be accepted unless they are clearly erroneous. *See Sheet Metal Wkrs. Int. Ass'n V. Los Alamos Const.,* 550 F.2d 1258, 1265 (10th Cir.). We conclude that the court's findings here were not clearly erroneous and that its holding that defendants' conduct in the court proceedings prevented assertion of their arbitration right was not in error. Accordingly, the judgment is

AFFIRMED.

---

[8]In *American Locomotive, supra,* 171 F.2d 115, the defendants filed an answer and counterclaim denying the material allegations of the complaint; set up six special defenses, one of which pleaded the arbitration clause as a bar to plaintiff's action; declined to move for a stay at the outset; and participated in extensive proceedings in the case, including pleadings, motions, agreed orders, and expensive discovery procedures, before insisting on arbitration.

We have noted *Controlled Sanitation Corp.* v. *Machinists District* 128 524 F.2d 1324 (3d Cir.), *cert. denied,* 424 U.S. 915, but doubt the persuasiveness of the majority position there. In any event the case seems distinguishable. The majority opinion there noted specifically, *id.* at 1326 n.3, that while the unions had taken a position that there was no collective bargaining agreement, they clearly reserved the right that the dispute should be submitted to arbitration, should the court find otherwise. That is not the case here. While the defendants were asserting their changing positions concerning the agreement they did not, until the day of the trial, assert as either a primary or alternative position a request for a stay or for an order for arbitration.

Supreme Court, U. S.
FILED
JUN 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-1712

In the Supreme Court of the United States

OCTOBER TERM, 1979

CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, and its affiliated LOCAL UNION 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL—CIO,

Petitioners,

vs.

REID BURTON CONSTRUCTION, INC., a Colorado corporation,

Respondent.

No. 79-1712

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the
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CARPENTERS DISTRICT COUNCIL OF SOUTHERN, COLORADO, and its affiliated LOCAL UNION 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO,

Petitioners,

vs.

REID BURTON CONSTRUCTION, INC., a Colorado corporation,

Respondent.

No. 79-1712

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Reid Burton Construction, Inc., the Respondent herein, respectfully requests that Petitioners' Request for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit be denied.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 614 F.2d 698, 103 LRRM 2475 (C.A. 10, 1980), and appears in

Appendix B hereto. The District Court Opinion is unreported and appears in Appendix A. Earlier Opinions of the District Court and the Court of Appeals are reported at 91 LRRM 2875 (D. Colo. 1974) and 535 F.2d 598 (C.A. 10, 1976), *cert. denied*, 429 U.S. 907 (1976), and appear respectively in Appendices D and E.

JURISDICTION

The Court of Appeals' Judgment and Opinion was dated and entered of record on January 31, 1980, affirming the Judgment of the District Court. The jurisdiction of the Court is invoked by Petitioners under 28 U.S.C. §1254(1).

QUESTION PRESENTED

The sole issue before the Court is whether the Court of Appeals erred in affirming the Decision of the District Court that the District Council and Local 1340 waived their right to arbitration because of their dilatory and evasive pleading tactics before the District Court.

STATEMENT OF THE CASE

On July 13, 1973 Respondent, Reid Burton Construction, Inc. (hereinafter referred to as "Burton"), filed its Complaint against Carpenters District Council of Southern Colorado (hereinafter referred to as "District Council"), and Local 1340 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (hereinafter referred to as "Local 1340"), and Colorado Building and Construction Trades Council (hereinafter referred to as "Trades Council"). (App. C at p. 42). Paragraph 5 of the Complaint alleged that the District Council and Local 1340 were *parties* to the subject Collective Bargaining Agreement and that the Agreement "*governed the relationship*" between Burton and the Unions. (App. C at pp. 42-43). Because of its refusal to sign an agreement with the Colorado

Building and Construction Trades Council whereby Burton would only subcontract with other employers who were in contractual relationship with labor organizations affiliated with the Building Trades Council, the Building Trades Council picketed construction building sites during March and April of 1973. Union carpenters refused to cross the picket lines and Burton alleged a breach of the no-strike clause in the Collective Bargaining Agreement against the District Council and Local 1340 and sought monetary damages and an injunction against the Unions. (App. C at pp. 44-45).

On August 6, 1973, the Unions filed Motions to Dismiss, and on August 20, filed a Joint Brief in Support of these Motions to Dismiss. Nowhere in the Motions or in the Brief supporting them was the question raised whether there was a binding arbitration agreement. (App. A at p. 21).

Burton filed an Amended Complaint on September 14, 1973 which was identical to the original Complaint except that it deleted the prayer for injunction against the Unions. Paragraph 5 of the Amended Complaint repeated the allegation that the District Council and Local 1340 were parties to the Collective Bargaining Agreement and that the Agreement governed the relationship between the parties (App. C at p. 46).

Again, in response to the Amended Complaint, the Unions filed a Motion to Dismiss and a Brief in Support of the Motion. Once again they did not include, as an issue, the fact that the pleadings asserted a dispute which was otherwise arbitrable under the Collective Bargaining Agreement. (App. A at p. 22).

On November 9, 1973, an Answer to the Complaint was finally filed by the Unions which stated that while the Carpenters District Council of Southern Colorado was a party to the Agreement as alleged in the Complaint, Local 1340 was not a party to the Agreement (App. C at p. 47). The Answer and

Counterclaim filed simultaneously therewith asserted the existence of a grievance and arbitration procedure in the Collective Bargaining Agreement; alleged that the Court action was barred by Burton's failure to exhaust contractual remedies; and, by Counterclaim, asked to have the Court find that Burton violated the Collective Bargaining Agreement by not employing the grievance and arbitration procedure. [Id. at pp. 48-49]. Notably, such claim was made only on behalf of the District Council and not Local 1340.

Nowhere in the pleadings did either Union *ever* ask the Court to order Burton's dispute to arbitration. At any point during these proceedings Local 1340 could have acknowledged it was bound by the Collective Bargaining Agreement and expressed its willingness to arbitrate; it chose not to do so. A reply to the Counterclaim was filed by Burton on December 5, 1973 which, *inter alia*, alleged that the Defendants had waived any right they may have had to arbitration (App. C at p. 50) and that the doctrine of laches would apply to the Counterclaim [Id. at p. 50].

On March 11, 1974, the Carpenters District Council and Local 1340 filed an Amended Answer but did not amend their position that Local 1340 was not a party to the Contract. (App. C at p. 50). Thus, at each step, Local 1340 and Carpenters District Council passed up the opportunity to ask the Court for an order of arbitration and to express a willingness on their part to participate in arbitration. On March 11, 1974 the Unions filed a Pre-Trial Statement where an "uncontroverted" fact was claimed by the Unions to be as follows:

> "5. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement, whereas Carpenters District Council of Southern Colorado is a party to said Agreement." (App. C at p. 52).

Thus, the Unions passed up another opportunity to admit being bound by the Contract and to request arbitration of the

dispute. On July 18, 1974, the Unions filed a "Suggestion to Dismiss" with the Court pursuant to *Federal Rules of Civil Procedure*, Rule 12(h)(3), asserting that the Court was without jurisdiction because Local 1340 now agreed it was "subject to the terms and provisions of the Agreement" (App. C at pp. 52-54). However, while continuing to ask for Court dismissal, at no time did the Unions ask that the matter be arbitrated or express a willingness to arbitrate! On July 12, 1974, five days after agreeing that Local 1340 was subject to the terms and provisions of the Collective Bargaining Agreement, the Unions filed an Amended Pre-Trial Statement wherein they continued to allege that Local 1340 was not a party to the Collective Bargaining Agreement (App. A at pp. 23-24).

On August 2, 1974, Burton filed a Reply to the Unions' Suggestion to Dismiss opposing the Motion and moving for assessment of costs and attorney's fees against the Unions for their dilatory and evasive pleading and procedural tactics. (App. C at p. 54). Thereafter, and until the day of trial, the Unions continued to assert that the Court was without jurisdiction but failed to request that the matter be arbitrated and waited until the very day of the Trial, and then only when questioned by the Court, did they admit they sought arbitration. (App. A at pp. 25-26). Because of the time already invested in this case and because the Court felt that the Unions should not be permitted to frustrate the judicial process at that late date, Judge Winner proceeded with the Trial. (App. B at p. 34). The Court proceeded to find that the Unions had flagrantly violated their collective bargaining agreement with Burton resulting in a loss to Burton of $10,801.97 (App. D at p. 63).

At the conclusion of the Trial on the merits, the District Court felt reluctantly bound by the holding in *Operating Engineers Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972), and, therefore, determined that it was for the Arbitrator to decide whether Defendants had waived their right to arbitration. The Court ordered a stay pending arbitration of Burton's claim against the District Council and Local 1340, but

stated upon motion by Burton that it would grant dismissal "to perfect an appellate record." (App. D at pp. 65-66). On December 13, 1974, Burton so moved and on January 2, 1975, Judgment was entered dismissing the Complaint, as amended (App. B at pp. 34-35).

Burton appealed to the Court of Appeals. By an opinion dated May 9, 1976, the Court of Appeals held that when the alleged dilatory and evasive tactics took place before the Court, it was for the District Court, not the Arbitrator, to decide whether delaying *pleading* tactics constituted waiver of the right to arbitration. The Court remanded the case to the District Court for further proceedings to determine whether the District Council and Local 1340 waived any right they may have had to arbitration by their evasive and dilatory tactics before the Court, 535 F.2d 598 (C.A. 10, 1976) (App. E at p. 78). The Unions petitioned this Court for Certiorari and the request was denied. See *Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado, et al,* 535 F.2d 598 (C.A. 10, 1976), *cert. denied,* 429 U.S. 907 (1976). On the record of pleadings as outlined above, the District Court concluded that the "pleadings and briefs filed for Defendants were evasive and dilatory . . . Plaintiff and the Court were lulled into a belief that Defendants wanted the Court to try the lawsuit, and that's what the Court did." (App. A at pp. 26-27).

On January 31, 1980, the Court of Appeals affirmed the District Court stating:

> ". . . [W]e cannot say that the finding of waiver by defendants, District Council and Local 1340, was clearly erroneous. We note the initial and consistent denial for one year of Local's status as a party; the ambiguous or confusing ultimate stance on this point; defendants' participation in numerous hearings, pre-trial conferences, motions, and other pleadings, and the deposing of witnesses; and their assertion of the arbitration clause merely as a

defense in bar and a counterclaim, without insisting upon or demanding immediately, as was their duty . . . enforcement of that provision." (App. B at pp. 39-40).

ARGUMENT FOR DENYING THE WRIT

The Decision of the Court of Appeals on Waiver of the Right to Arbitration When a Party Engages in Dilatory and Evasive Pleading Tactics is Not in Conflict With Decisions of Other Circuits.

The Petitioners have sought a Writ of Certiorari on two grounds. Firstly, they assert that the application of the "clearly erroneous" standard to the findings of the District Court constituted error because the issue of waiver is a matter of law rather than a matter of fact. (Pet. p. 11 n. 3)[1]

Secondly, Petitioners suggest that there is a controversy between the circuits with regard to the standard of what constitutes waiver of the right to arbitrate when the parties are involved in litigation of the issue (Pet. pp. 15-16). This allegation is totally without merit.

I. The Issue Before the District Court Was an Issue of Fact.

The Petitioners have asserted that the Court of Appeals did not point to any conduct which reflected an intentional relinquishment or abandonment by the Unions of their arbitration defense. In the absence of such intentional waiver, they suggest that the issue is "whether, *as a matter of law*, the arbitration defense should be deemed constructively waived because of, most significantly, the absence until trial of a request by the District Council and Local 1340 that arbitration be ordered." (Pet. p. 11).

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[1]References to the Petition for Writ of Certiorari shall be designated "Pet." with the numerical designation of the page immediately following.

The Unions had previously petitioned this Court for Certiorari with regard to the original decision of the United States Court of Appeals for the Tenth Circuit in remanding this case to the District Court for determination as to whether the conduct of the Unions constituted estoppel or waiver of its right to arbitration. The Petition for Certiorari was denied. See, *Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado, et al.*, 535 F.2d 598 (C.A. 10,, 1976), *cert. denied*, 429 U.S. 907 (1976). In remanding to the District Court, the Tenth Circuit detailed the issue to be decided by the lower court

> "It is entirely appropriate in some instances for a district court to retain Section 301 jurisdiction of an arbitrable dispute where, because of conduct before the court, it may be deemed that a party is prevented on the basis of some equitable principle from asserting a right to arbitration. Whether the instant case is one such instance has not been decided. Therefore, we remand this case for such a determination. If the District Court finds that there has been no estoppel or waiver because of the unions' conduct in pleading, then it is proper to order arbitration of the underlying dispute — the alleged violation of the no-strike clause. If on the other hand it is determined that the unions have waived their right to arbitration, or in some other way have been prevented from asserting this right, because of conduct which falls within the control of the court, then the district court can properly proceed to the merits of the underlying dispute."
> (App. E at p. 78) 535 F.2d 598 (C.A. 10, 1976).

The only issue before the District Court on remand was whether the "Unions' conduct in pleading" constituted a waiver of their right to arbitration. Clearly that determination depends on the facts in the case.

The Tenth Circuit, citing *Burton Dixie Corp. v. Timothy McCarthy Construction Co.*, 436 F.2d. 405, 408 (C.A. 5, 1971), stated:

> "There is no set rule as to what constitutes a waiver or abandonment of the arbitration agreement; the question depends upon the facts of each case and usually calls for a finding of the trier of facts." (App. B at p. 38).

It is within the sound discretion of the trial court to determine what constitutes laches, and that determination should be made on the equitable circumstances of each case. *Czaplicki v. S.S. Hoagh Silver Cloud*, 351 U.S. 525 (1955).

The District Court found that the following actions of the Unions constituted "dilatory and evasive" pleading tactics: their initial denial of party status to the collective bargaining agreement, and later admission of such status, deposing witnesses, participating in pre-trial conferences, numerous motions and other pleadings, without ever insisting on or demanding arbitration. Such evasive and dilatory pleading tactics constituted waiver of the Unions' right to arbitration. See, *Cornell & Company v. Barber & Ross Company*, 360 F.2d 512 (D.C. Cir., 1966); *General Guaranty Insurance Company v. New Orleans General Agency, Inc.*, 427 F.2d 924 (C.A. 5, 1970); *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (C.A. 2, 1959) *appeal dismissed*, 364 U.S. 801 (1960); *American Locomotive Company v. Chemical Research Corp.*, 171 F.2d 115 (C.A. 6, 1948), *cert. denied*, 336 U.S. 909 (1949); *E. T. Simonds Const. Co. v. Local 1330 of Int. Hod Carriers*, 315 F.2d 291 (C.A. 7, 1963); *Radiator Specialty Co. v. Cannon Mills*, 97 F.2d 318 (C.A. 4, 1938); *Hilti, Inc. v. Oldach*, 392 F.2d 368 (C.A. 1, 1968); *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, (C.A. 2, 1968); *Kulukundis Shipping Co. v. Amtorg Training Corp.*, 126 F.2d 978 (C.A. 2, 1942); *Local 198, United Rubber, C. L. & P. Wkrs. v. Interco Inc.*, 415 F.2d 1208 (C.A. 8, 1969); *Burton Dixie*

Corp. v. Timothy McCarthy Construction Co., 436 F.2d 405 (C.A. 5, 1971).[2]

The Court of Appeals reaffirmed the well-established policy that the right of arbitration, like any other right, can be waived. See *Cornell & Company v. Barber & Ross*, 360 F.2d 512 (D.C. Cir., 1966); *Radiator Specialty Company v. Cannon Mills, Inc.*, 97 F.2d 313 (C.A. 4, 1938); *E. I. DuPont DeNemours & Company v. Lyles & Lang Construction Company*, 219 F.2d 328 (C.A. 4, 1955); *American Locomotive Company v. Gyro Process Company*, 185 F.2d 316 (C.A. 6, 1950); *Galion Ironworks v. Adams*, 128 F.2d 411 (C.A. 7, 1942). The Court of Appeals correctly indicated that the question of whether the Unions waived their arbitration defense depends on the facts of the case and requires a finding by the trier. (App. B at p. 38). The District Court made a determination on the issue before it, and the Court of Appeals properly applied the "clearly erroneous" standard to that Decision. See *Sheetmetal Workers Int. Ass'n. v. Los Alamos Const.*, 550 F.2d 1258 (C.A. 10, 1977). See also *Commission of Internal Revenue v. Dubenstein*, 363 U.S. 278, 80 S. Ct. 1190 (1960); Fed. R. Civ. P.; Rule 52(a).

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[2]In the cases cited by Petitioners in their Petition for Writ of Certiorari, where the Court granted a stay pending arbitration, a shorter period of time had elapsed between the initiation of the litigation and their request for stay. In *Robert Lawrence Company v. Devonshire Fabrics Co., Inc.* 271 F.2d 402 (C.A. 2, 1959), *appeal dismissed*, 364 U.S. 801 (1960), Plaintiff had also been apprised by the Defendant early in the proceeding that its intent was to arbitrate the matter, such was not the case herein. In *Carcich v. Rederi A/B Nordie*, 389 F.2d 692 (C.A. 2, 1968), the court stated that while the law is clear that participation in litigation, standing alone, does not constitute a waiver, waiver may be inferred where there has been some resultant prejudice to a party. In the instant case the Court of Appeals noted that, "the preparations until that time for trial in the Court do, in our opinion, amount to sufficient prejudice that it is inequitable for a party at that point to shunt the controversy over to the arbitration procedures." (App. B at p. 40). See also *American Locomotive Company v. Chemical Research Corporation*, 171 F.2d 115 (C.A. 6, 1948), *cert. denied*, 336 U.S. 909, 69 S. Ct. 515 (1949).

II. The Court of Appeals' Decision Does Not Conflict With The Decision of Other Circuits on The Question of The Waiver of The Right to Arbitration.

While the Petitioner cites numerous cases for the proposition that the federal policy favors arbitration, the Unions rely primarily on just one case, *Controlled Sanitation Corp. v. Machinists District 128*, 524 F.2d 1324 (C.A. 3, 1975), *cert. denied*, 424 U.S. 915 (1976) in alleging that the decision of the Tenth Circuit herein conflicts with decisions of other circuits on the question of the waiver of the right to arbitration.

The Tenth Circuit specifically noted that *Controlled Sanitation supra*, is clearly distinguishable from the instant case:

> "The majority opinion there (in *Controlled Sanitation*) noted specifically, *id.* at 1326 n. 3, that while the unions had taken a position that there was no collective bargaining agreement, they clearly reserved the right that the dispute should be submitted to arbitration, should the Court find otherwise. That is not the case here. While the defendants were asserting their changing positions concerning the agreement, they did not, until the day of trial, assert as either a primary or alternative position a request for a stay or for an order for arbitration." (App. B at p. 40).

The determination by the Court of Appeals that the Unions had a duty to demand arbitration immediately is well founded and is totally consistent with the decision of other circuits deciding on similar facts. For example, the Court of Appeals correctly cited *Radiator Specialty Company, supra*, which stated:

> "Arbitration laws are passed to expedite and facilitate the settlement of disputes and avoid the delay caused by litigation. It was never intended that these laws should be used as a means of furthering

> and extending delays. Under the statute above quoted [Federal Arbitration Act, 9 U.S.C. §3], it is clearly the intention of Congress to provide that the party seeking to enforce arbitration can do so only when not guilty of dilatoriness or delay. One having the right to arbitrate and to stay an action at law, pending arbitration under this statute, may waive such right." 97 F.2d at 319.

See also *Cornell & Company v. Barber & Ross Company*, 360 F.2d 512 (D.C. Cir., 1966); *General Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924 (C.A. 5, 1970); *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (C.A. 2, 1959); *American Locomotive Company v. Chemical Research Corp.*, 171 F.2d 115 (C.A. 6, 1948, *cert. denied*, 336 U.S. 909 (1949); *E. T. Simonds Construction Co. v. Local 1330 of Int. Hod Carriers*, 315 F.2d 291 (C.A. 7, 1963); *Hilti, Inc. v. Oldach*, 392 F.2d 368 (C.A. 1, 1968); *Carcich v. Rederi A/B Nordie*, 389 F.2d 692 (C.A. 2, 1968); *Kulukundis Shipping Co. v. Amtorg Training Corp.*, 126 F.2d 978 (C.A. 2, 1942); *Local 98, United Rubber, C.L. & P. Wkrs. v. Interco, Inc.*, 415 F.2d 1208 (C.A. 8, 1969); *Burton Dixie Corp. v. Timothy McCarthy Construction Co.*, 436 F.2d 405 (C.A. 5, 1971).[3]

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[3]The cases cited by the Petitioners on pp. 15-16 do not support their proposition that a Court cannot find that a party waived its right to arbitration, even if it deliberately delayed for over a year, after engaging in litigation, before it requests a stay pending arbitration. In *Shanferoke Coal Supply Corporation v. Westchester Serv. Corp.*, 70 F.2d 297 (C.A. 2, 1934), the Defendant, in its Answer and Affidavits, expressed its willingness to submit to arbitration, such was not the case herein. In *Kulukundis Shipping Company v. Amtorg Trading Corp.*, 126 F.2d 978 (C.A. 2, 1942), the Court specifically distinguished *Radiator Specialty, supra*, by stating that the Defendant had not, as here, filed a counterclaim and did not participate in the lawsuit without seeking arbitration. *Martin Marietta Aluminum, Inc. v. General Electric Company*, 586 F.2d 143 (C.A. 9, 1978) is in no way similar to the instant case; unlike the situation herein, the contract in *Martin Marietta* specifically *relieved* the Defendant of *any* obligation to request arbitration. Further, in *Aircraft Lodge 703 v. Curtiss-*

The Court of Appeals, in keeping with this longstanding policy and the standards applied by the other circuits for a finding of waiver, affirmed the finding of the District Court that the Unions waived their right to arbitration by not requesting arbitration at the outset, as was their duty.

There can be no question that the Decision of the Tenth Circuit Court of Appeals in this instant case does not conflict with other circuit decisions involving similar facts.

CONCLUSION

Clearly, the Petitioners do not assert any colorable grounds for the grant of a Writ of Certiorari in this case. The issue which was remanded by the Tenth Circuit to the District Court was to make a factual determination as to whether the Unions had engaged in dilatory and evasive pleading tactics before the Court, thereby waiving their right to arbitration. Applying the well-settled legal standards regarding the waiver of the right of arbitration, the District Court made a factual determination that the Unions did indeed engage in such dilatory and evasive pleading tactics and found that they waived their right to arbitration. The Court of Appeals concluded that ". . . we cannot say that the finding of waiver by Defendant District Council and Local 1340 was clearly erroneous." (App. B at pp. 39-40) and affirmed the judgment of the District Court.

Since the issue on remand to the District Court was a factual issue, the Court of Appeals correctly applied the

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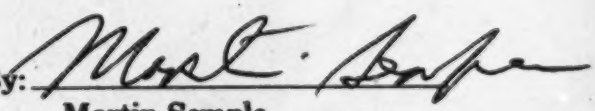
[3](Continued)

Wright Corp., 169 F. Supp. 837 (D.N.J., 1959), the Defendant promptly obtained an Order from the Court to show cause under the terms of the Federal Arbitration Act staying the trial pending arbitration. Defendant also stated its willingness to arbitrate and repeatedly asked the Plaintiff to do so. In *Kastanias v. Nationwide Auto Transporters, Inc.*, 390 F.Supp. 720 (W.D. Pa., 1975), Defendants made a demand for arbitration upon Plaintiffs soon after the action was filed.

"clearly erroneous" standard to that Judgment, and since there is no conflict between this Decision of the Tenth Circuit and the other circuits on the question of waiver of the right to arbitration in similar circumstances, the Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals for review of its Decision should be denied.

Respectively submitted,

GOOD AND STETTNER, P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 1980, ~~a copy~~ Three Copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari To the United States Court of Appeals for the Tenth Circuit ~~was~~ were deposited in the U.S. Mails, postage prepaid, and addressed to John W. McKendree, Esq., McKendree & Lubin, 1244 Grant Street, Denver, Colorado 80203, attorneys for Petitioners.

Mark L. Evans

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. C-5184

REID BURTON CONSTRUCTION, INC., a Colorado corporation, Plaintiff, vs. CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, LOCAL 1340 of The INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL, unincorporated associations and labor organizations, Defendants.	MEMORANDUM OPINION

This hoary case is ready for decision again. November 19, 1974, I thought I had touched all bases in a way which would decide the case whether I was right or wrong on the difficult questions of law presented. I had earlier dismissed Colorado Building and Construction Trades Council, (a dismissal which was not appealed) and, as to the other two defendants, I said that I was convinced that each had violated a no-strike clause

of their contract with plaintiff. I also said that I was convinced that plaintiff sustained damage, and I fixed the damages at $6,392.52 on the "Markley Motors job," and $4,409.45 on the "Everitt job." All of this is explained in my earlier opinion, and it need not be repeated here. The predictable appeal which followed didn't question the finding of contract breach or damages. It argued only jurisdiction.

In my November, 1974, opinion, I said, "Having found that defendants broke their promise not to strike and having found the amount of damages resulting to plaintiff as a result of defendants' breach of contract, I must face up to the question of whether I have jurisdiction to enter judgment against defendants. To do this, I must decide whether the arbitration clause covers the dispute and makes arbitration mandatory. Then, I must decide whether because of waiver, repudiation, estoppel, laches or any other reason, the matter should not be sent to the arbitrator." After analyzing *Drake Bakeries v. Bakery Workers*, (1962) 370 U.S. 254, and *Atkinson v. Sinclair Refining Co.*, (1962) 370 U.S. 238, I concluded that the question was one covered by the arbitration clause. I added that although I didn't like the result, and although I personally agreed with Justice Powell's dissent, I thought that *International Union of Operating Engineers Local 150 v. Flair Builders*, (1972) 406 U.S. 487, precluded me from deciding and forced me to let the arbitrator decide whether defendants' conduct estopped them from insisting on arbitration or whether they had waived their right to arbitration. [I think that it was pretty clear in that opinion what I wanted to hold.] The Court of Appeals said that I was right in holding that the basic question was covered by the arbitration clause, but it said that I was wrong in holding that I was bound by the result in *Flair Builders* which I thought required the conclusion that equitable questions were for an arbitrator to decide. Chief Judge Lewis distinguished *Flair Builders* saying:

> "In sum we conclude that the enumerated equitable defenses discussed are, in general, mandated by Flair

Builders to the arbitrator for determination of the continued vitality of the contractual arbitration process. However, if such defenses arise solely during the course of the judicial process the arbitrator is not the one to determine whether the judicial process has been abused by either party or at all or whether an equitable defense to the main dispute has been established during the course of the judicial trial by in-trial conduct."

Defendants asked for certiorari, but the Supreme Court refused to accept the case. Upon receipt of the remand, I made inquiry as to whether any party wanted to take more testimony, and all parties notified the court in writing that additional evidence was not desired. It was agreed that the case would be decided on the record made, and a briefing schedule was agreed to. The last brief was filed April 1, 1977, and the case is ready for me to try once more for final disposition.

Without rehashing all that has been said before, I incorporate by reference the facts found in my earlier opinion, and I repeat that I take a dim view of defendants' whirlygig positions during the course of the litigation. As I shall explain presently, I think that advertently or inadvertently the court and plaintiff's counsel were led down a primrose path by a failure on the part of defendants' counsel to communicate to the court and opposing counsel in a timely way the argument of defendants that the dispute was one subject to arbitration. These are some of the things which led up to setting a case for trial and trying a case which was subject to arbitration unless, as phrased by Chief Judge Lewis, "the unions should be prevented from demanding arbitration because of 'evasion' and 'dilatory' pleading practices before the court." After relating some of the 180 degree course changes by defendants, I said in my opinion of two and a half years ago that "sophistry such as this does not help a court in its futile efforts to keep up with an over-crowded docket." I haven't changed my mind, and I am sure that it comes as no surprise to anyone that now that the

Court of Appeals has said that I have jurisdiction to do so, I unhesitatingly hold that the unions are "prevented from demanding arbitration because of 'evasive' and 'dilatory' pleading practices before the court." Here are a few of the reasons why: —

Plaintiff filed an original and an amended complaint. Both pleaded that plaintiff and the two defendants "were parties to a collective bargaining agreement," and that the agreement "governed the relationship" between plaintiff and defendants. The defendants answered the original complaint and they answered the amended complaint. Both answers denied that either defendant was a *party* to the agreement, and it was denied that the agreement governed their relationship. They did not admit anywhere in these pleadings that they were "bound" by the agreement and they did not say that they would be subject to or that they would live by an arbitrator's decision. The complaint was filed July 13, 1973, and it was but three days short of a year thereafter that the defendant Local first said that it was *"bound"* by the contract, even though it was not a *"party"* to a contract which did not "govern the relationship" of the litigants. I repeat what I said November 19, 1974, after everyone's efforts and time had been expended in getting the case to trial:

> "Defendants argue that they have not changed their position, and they explain that the time spent by plaintiff's counsel and the court in preparing the case for trial was wasted time because plaintiff's counsel and the court should have read more literally defendant's assertions that Local 1340 was not a *party* to the contract and should not have been taken aback by defendant's July 10, 1974, assertion that the non-party local was *bound* by a contract to which it is not a *party, and this even though defendants had denied that they were governed by the agreement.*"

Defendants must be students of Lewis Carroll, because, as was said in *Through the Looking Glass:*

> "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'
>
> "'The question is,' said Alice, 'whether you can make words mean so many different things.'
>
> "'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'"

Defendants' reasoning escapes me. They say that they are non-parties to a contract but that they are "bound" by a contract to which they aren't a party. I know about third-party-beneficiaries of a contract, but the concept of "third-party-obligors" is new to me.

In more detail, the history of the case is that the first complaint was filed July 13, 1973, and, as I have said, it pleaded that plaintiff and defendants were parties to a collective bargaining agreement and that the agreement "governed their relationship." Defendants moved to dismiss, but the motion and brief supporting it did not raise the question of whether there was a binding arbitration agreement. The slightest mention of *Boys Market, Inc. v. Retail Clerks Union,* (1970) 398 U.S. 235, *Gateway Coal Co. v. Mineworkers Union,* (1974) 414 U.S. 368, the *Steel Trilogy cases,* or any of countless other cases would have led immediately to *Drake Bakeries v. Bakery Workers,* (1962) 370 U.S. 254, and *Atkinson v. Sinclair Refining Co.,* (1962) 370 U.S. 238, and the lawsuit would have been all over at that point if defendants had then suggested that there was an agreement to arbitrate, binding on both parties. The jurisdictional question was available to defendants on motion to dismiss — in fact that is the way it is typically raised — but defendants argued for dismissal on unrelated grounds without mention of any contention that I

should order arbitration of a contract dispute by a non-party to the agreement.

The amended complaint asked for no injunction, but in other respects it was the same as the first complaint. Once more, defendants moved to dismiss, but neither the motion nor the brief in support gave any clue that defendants thought there was a *Boys Market* problem, and the thought surely didn't occur to me. Again, defendants gave no hint that they wanted me to order arbitration.

November 9, 1973, defendants answered. Paragraph 5 of the amended complaint is the paragraph which said that defendants were parties to the agreement and that it governed their relationship. Defendants denied the averments of paragraph 5, and they *affirmatively pleaded* that the District Council was a party to the agreement, but that *"Defendant Local 1340 is not a party* to the aforementioned collective bargaining agreement." It is true that the answer said that Burton had failed to exhaust the contractual remedies and defendants said that Burton had violated the agreement by not seeking arbitration, but there was no claim made that the court was without jurisdiction because the parties were contractually bound to arbitrate — and under defendants' then position the Local wasn't a party to the contract nor was there suggestion of the "third-party-obligor" concept. Nowhere was there any suggestion that defendants were either parties to the agreement or that the Local was "bound" by it. Had the Local taken this position at that time, and had it said that there was an arbitration agreement binding on everyone in the lawsuit, a summary judgment motion would have been granted with all convenient speed. Defendants didn't move for summary judgment, and they let the case crawl towards a trial. A reply to the counterclaim was filed directed to the claim of contract violation by Burton, and, once more, *plaintiff said* that the defendants were both *parties* to the agreement. The reply was filed December 5, 1973, and three months later the defendants filed an amended answer which, all over again, did not admit

that the Local was a party to the contract nor did it suffice to clue me in on the idea that the Local was "bound" by a contract to which it was not a party and which didn't govern the relationship between the parties.

The same day the amended answer was filed, all parties filed pretrial statements. Plaintiff listed as the first contested issue of fact:

> "1. Is Defendant Local 1340 a party to the subject labor agreement?"

Defendants statement said, inter alia:

> "The Defendant Carpenters District Council of Southern Colorado is a party to the aforementioned collective bargaining agreement with the plaintiff . . . Furthermore, the *defendant Local 1340 is not a party* to the aforementioned collective bargaining agreement with the plaintiff . . . It is the defendant Carpenter Union's position that these two alleged violations of the collective bargaining agreement are clearly disputes involving the interpretation and application of said collective bargaining agreement and, therefore, the resolution of these disputes lies solely and exclusively within the province of the dispute resolution machinery contained in Article XII of said collective bargaining agreement. Thus this court has no jurisdiction over the subject matter of the action. . . ."

> [I concede that careful study of this statement could alert a suspicious person, but plaintiff's counsel and I didn't react to the double talk.]

And, although plaintiff said that the fact was controverted, *defendants said* in their pretrial statement that an "uncontroverted fact" was,

> "*Defendant Local 1340 is not a party* to the aforementioned collective bargaining agreement, whereas Carpenters District Council of Southern Colorado is a party to said agreement."

For sure, defendants acquiesced in setting the case for trial, and their pretrial statement cheerfully estimated the length of trial to be held in this court.

It is to be remembered that as was emphasized in *Boys Market, Sinclair Refining Co. v. Atkinson,* (1962) 370 U.S. 195, insists that arbitration agreements under no-strike clauses will be enforced only if the dispute involves "a grievance which both parties are *contractually bound* to arbitrate." I say again, that although defendants have no problem with non-parties being "contractually bound," I am challenged by the concept, and no such thought came to mind as long as defendants were arguing that the Local wasn't a *party* to the contract.

> ". . . the Red Queen said to Alice, 'Always speak the truth — think before you speak — and write it down afterwards.'
>
> "'I'm sure I didn't mean ---' Alice was beginning, but the Red Queen interrupted her impatiently.
>
> "'That's just what I complain of! You *should* have meant!"
>
> . . . . . .
>
> "'She's in that state of mind,' said the White Queen, 'that she wants to deny *something* — only she doesn't know what to deny!"

It was on July 18, 1974, that defendants decided what they wanted to admit and what they wanted to deny, because that day they filed a "Suggestion to dismiss." It was supported by a brief which said, "Although heretofore the defendants have

questioned whether the Defendant Local 1340 was a party to the collective bargaining agreement entered into by Reid Burton and the Carpenters District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreement." Here was the first suggestion of expansion of third-party-beneficiary principles to third-party-obligors, but if defendants' true position wasn't crystal clear as of July 19, 1974, when it filed its "Suggestion to dismiss," the clarity of defendants' thinking was further obfuscated by its *amended pretrial statement filed five days* after the "Suggestion to dismiss":

> ". . . the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with the plaintiff,"

and that same day plaintiff's amended pretrial statement listed as an issue the question of whether the local was a party to the agreement. This brought the matter to a head, and defendants were asked to explain in words even the court could understand just what their position was. This is the explanation:

> "Defendants' position is simply that, although Local 1340 is not a party to the agreement, it is bound by the substantive terms of the agreement."

This, defendants said, deprived the court of jurisdiction, but defendants made no offer to obtain nor did they agree to submit to binding arbitration. In the words of *Sinclair*, defendants admission that the Local (a non-party to the contract) is "bound" by the agreement's substantive terms, is not to me an all out admission that the Local was "contractually bound to arbitrate."

On this queasy record the case went to trial on October 1, 1974, and I was astonished to find out that defendants wanted

me to issue a mandatory *Boys Market* type injunction ordering plaintiff to arbitrate. The record shows my surprise:

> "THE COURT: Now tell me, when do you say you first requested that I, by mandatory injunction, order plaintiff to arbitrate? I must question that. I have difficulty in reading your pleadings, so tell me where and when you say you first requested that mandatory injunctive relief?
>
> "DEFENSE COUNSEL: When requested to do so today, your honor.
>
> "THE COURT: All right. That's what I thought . . . Is it possible . . . put very inartfully . . . that the defendants really didn't want arbitration until their feet got right in the fire?"

The answer by counsel wasn't very helpful to me. Accordingly, because of the time already invested in the case and because of my then thinking that defendants shouldn't be permitted to frustrate the judicial process at that late date, I went ahead with the trial. [No one had called *Flair Builders* to my attention at time of trial, and it was with chagrin that I read it post trial. I only wish that I had thought of the analysis of it made by the Court of Appeals, because I surely hated to go along with what I thought it said.]

I do not say that there was conscious misrepresentation on the part of counsel. I think that the pleadings were hastily drawn and perhaps counsel didn't really face up to the lawsuit until the eve of trial. I say this to emphasize that I think that the unfortunate results may have been largely inadvertent rather than intentional, but the impact on the court and on plaintiff were the same no matter what the intent of defense counsel. The pleadings and briefs filed for defendants were evasive and dilatory, and whether they were so because of intent or as a result of negligence, plaintiff and the court were

lulled into a belief that defendants wanted the court to try the lawsuit, and that's what the court did. I must confess that as I think back on the farce of the union's claim that there was no "strike" and their claim that there was only "voluntary individual action," and when I recall the remarkable coincidence of immediate punitive action against two carpenters who didn't "voluntarily stay away from work," I am unconvinced that the union's conduct was pristine. When union members who live in Longmont, Colorado, who don't "voluntarily stay away from work," in Fort Collins, Colorado, are ordered to stand union trial in Montrose, Colorado, and when they are swiftly convicted and fined by the union because of their failure to "voluntarily stay home," it strains credulity to think that there wasn't just a little malice aforethought.

I am sure that the record in this case demonstrates that the conduct of defendants *in this case in this court* establish the equitable defenses to arbitration mentioned by Chief Judge Lewis, and I so hold. The unions played games with plaintiff and the court too long to now insist on an injunctive order requiring plaintiff to arbitrate this stale dispute.

The rest is easy, and to the best of my knowledge it wasn't attacked on appeal. November 19, 1974, before reaching the question of whether I had jurisdiction under *Drake, Sinclair* and *Flair*, I found factually:

> "The record in this case convinces beyond peradventure that Carpenters District Council of Southern Colorado violated the no strike clause of the labor contract to which it was a party and that Local 1340 of the International Brotherhood of Carpenters & Joiners of America, AFL-CIO violated the same provision of the same contract which the local has not judicially admitted was binding on it. The defendants flagrantly violated the contract jointly and severally.

"Plaintiff sustained damage as a result of those violations. The fact of damage is certain, although the amount of damage is somewhat less certain. Defendants did not controvert the damage testimony and the record made in this case permits a finding, and I find that as a result of defendants' contract violation, plaintiff was damaged in the amount of $6,392.52 on the Markley Motors job and in the amount of $4,409.45 on the Everitt job. The plaintiff was damaged in the total amount of $10,801.97 as a direct and proximate result of defendants' flagrant violations of the contract's provisions."

Judgment shall enter in favor of plaintiff and against defendants in the amount of $10,801.97, plus interest and costs as permitted by law.

Dated this 18th day of April, 1977.

/s/ Fred M. Winner
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

REID BURTON CONSTRUCTION, INC., Plaintiff, vs. CARPENTERS DISTRICT COUNSEL OF SOUTHERN COLORADO, LOCAL 1340 OF THE INTERNATIONAL BROTHERHOOD OF CARPENTERS JOINERS OF AMERICA, AFL-CIO, and COLORADO BUILDING AND CONSTRUCTION TRADES COUNSEL, Defendants.	)	Civil Action No. C-5184 **JUDGMENT**

Pursuant to and in accordance with the Memorandum Opinion signed by The Honorable Fred M. Winner, Chief Judge, and filed on April 19, 1977, it is hereby

ORDERED that judgment is entered in favor of plaintiff, Reid Burton Construction, Inc., and against defendants, Carpenters District Counsel of Southern Colorado, Local 1340 of the International Brotherhood of Carpenters Joiners of America, AFL-CIO and Colorado Building and Construction Trades Counsel, in the sum of Ten thousand eight hundred one and 97/100 dollars ($10,801.97) plus interest at the legal rate as provided by law; it is

FURTHER ORDERED that the plaintiff have and recover costs upon the filing of a bill of costs with the Clerk of this Court. The bill of costs must be filed within 10 days after entry of this judgment.

DATED at Denver, Colorado, this 19 day of April, 1977.

FOR THE COURT:

JAMES R. MANSPEAKER, Clerk
United States District Court

Approved:

FRED M. WINNER
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

REID BURTON CONSTRUCTION, INC., a Colorado corporation, Plaintiff-Appellee,	)	
v.	)	
CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, and LOCAL NO. 1340 of the UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO,	)	NO. 77-1458
Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. C-5184)

Robert I. Cohn, Denver, Colorado (Robert G. Good and Martin Semple of Good and Stettner, Denver, Colorado, were on the brief) for Plaintiff-Appellee.

John W. McKendree (McKendree & Lubin, Denver, Colorado, were on the brief) for Defendants-Appellants.

Before HOLLOWAY, DOYLE and LOGAN, Circuit Judges

HOLLOWAY, Circuit Judge

This appeal brings before us for the second time a dispute involving alleged breach of the no-strike clause of a collective bargaining agreement, asserted as a §301 suit under 29 U.S.C. §185, between plaintiff Reid Burton Construction, Inc. (Burton), and defendants Carpenters District Council of Southern Colorado (District Council) and Local 1340 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Local 1340 or Local).

I

The relevant facts are as follows. The complaint (II R. 1-6), filed July 13, 1973, and the amended complaint (II R. 73-77)[1] based jurisdiction on Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185,[2] and in paragraph 5 alleged that defendants were parties to the collective bargaining agreement and that the agreement governed the relationship between the parties. Following denial of their motions to dismiss,[3] defendants on November 9, 1973, filed an answer[4] in which they denied the allegations of paragraph 5,

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[1]The complaint and the amended complaint were identical, except that the latter deleted plaintiff's request for injunctive relief.

[2]Section 185(a) of Title 29, U.S.C. provides:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[3]These motions were filed in response to plaintiff's complaint and amended complaint and were denied on October 26, 1973. (I R. 115). On November 23, 1973, another defendant, Colorado Building and Construction Trades Council (Trades Council), was dismissed from the suit. (I R. 84, 115; II R. 138-39; III R. 307).

[4]Though defendants later amended their answer, the changes did not relate to the issue presented in this appeal.

stating that District Council was party to an agreement with plaintiff but that Local 1340 was not a party. The answer also asserted the contract's arbitration clause as a bar to plaintiff's action and as the basis of a counterclaim for breach of the agreement and damages.[4a]

Defendants maintained this position throughout pretrial and discovery proceedings. *See generally* I R. 115-116. On July 18, 1974, they filed a Suggestion to Dismiss, stating that the pleadings and depositions on file showed on their face "that the controversy described therein is one within the exclusive jurisdiction of an arbitrator" under the contract's arbitration clause. In the brief supporting this suggestion defendants conceded that Local 1340 was subject to the agreement's terms and that local "would be bound by an arbitral award" issued in accordance with them. But defendants made no motion to stay the court proceedings (*see* Brief of Appellants at 29 n.25), and no motion for an order directing plaintiff to arbitrate.[5] Their apparently changed

[4a]Defendants in their answer also pleaded an Eighth Affirmative Defense (II R. 126) in which they stated that:

> The defendants . . . , without waiving their contention that the interpretation and application of the provisions of the aforementioned collective bargaining agreement is within the sole and exclusive province of the disputes resolution machinery agreed to therein, assert that they have neither waived their right, nor the right of the employees they represent, to honor a picket line established by another labor organization.

[5]With respect to whether plaintiff Burton was misled into thinking the defendants would not ask for an order for arbitration, a point discussed further below, we note that in a written reply on August 2, 1974, to the defendants' Suggestion to Dismiss, plaintiff Burton did criticize the defendants' temerity at that late hour to suggest that "the court cannot further proceed in this action *and must order arbitration.*" (III R. 210). (Emphasis added). However, the Suggestion itself and the exchanges between the parties dealt mainly with the request to dismiss the action and the defendants' Suggestion and brief do not actually seek an order for arbitration.

position was "further obfuscated," the trial judge said (I R. 91); the judge noted that five days later in their amended pretrial statement defendants pleaded that "the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with plaintiff." (I R. 91).

The case proceeded to trial on October 1, 1974. During trial, defense counsel questioned Mr. Burton to establish the point that he had not sought arbitration under the contract. The court then asked defense counsel if he would agree that he would arbitrate the question of damages and be bound by it, and counsel so agreed. The judge then referred to the loss of time and expense to the parties and loss of the court's time. (IV R. 49-51). Counsel further responded to questions by the court that defendants did demand arbitration, and that arbitration should be ordered under *Boys Market, Inc. v. Retail Clerks Union*, 398 U.S. 235. (*Id.* at 111).

Later in the trial in response to further questioning by the court defense counsel admitted that he first requested, by mandatory injunction, an order for plaintiff to arbitrate "when requested to do so today." (IV R. 140.) Defense counsel maintained, however, that defendants' position since filing of the answers had been that the appropriate forum was arbitration. (*Id.* at 142).

Because of the time already invested in the case and because of his view that defendants should not be permitted to frustrate the judicial process at that late date, the judge went ahead with the trial. During the trial, evidence was presented on the issues of breach of the no-strike clause, damages, various defenses and the relationship of the union organizations.

Subsequently, the trial judge issued the original opinion in which he held, *inter alia*, that the dispute itself was arbitrable. (III R. 314). In addition, relying on *Operating Engineers Local 150 v. Flair Builders*, 406 U.S. 487 (1972), he held that the preliminary question whether defendants had not

waived their right to arbitration by "evasive and dilatory" brief and pleading tactics in the district court should properly be decided by an arbitrator. (*Id.*). He ordered a stay of the district court proceedings, then later, upon plaintiff's motion, dismissed the suit altogether so that plaintiff might perfect an appeal. (III R. 315, 320).

In the first appeal, see *Reid Burton Construction v. Carpenters District Council of Southern Colorado*, 535 F.2d 598, *cert. denied*, 429 U.S. 907 (1976), we upheld the trial court's determination that the dispute was properly arbitrable under the terms of the contract, but found that when the actions premising plaintiff's equitable defense to defendants' asserted arbitration right occurred solely before the court, it was improper to have given the arbitrator the equitable preliminary issues to decide. Accordingly, we remanded the case to the district court for determination of whether defendants, by evasive and dilatory pleading practices before that court, were prevented from asserting any right they may have had to arbitration.[6]

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[6]In that first appeal we stated (535 F.2d at 604):

> It is entirely appropriate in some instances for a district court to retain section 301 jurisdiction of an arbitrable dispute where, because of conduct before the court, it may be deemed that a party is prevented on the basis of some equitable principle from asserting a right to arbitration. Whether the instant case is one such instance has not been decided. Therefore, we remand this case for such a determination. If the district court finds that there has been no estoppel or waiver because of the unions' conduct in pleading, then it is proper to order arbitration of the underlying dispute — the alleged violation of the no-strike clause. If on the other hand it is determined that the unions have waived their right to arbitration, or in some other way should be prevented from asserting this right, because of conduct which falls within the control of the court, then the district court can properly proceed to the merits of the underlying dispute.

On remand the district court found that defendants' conduct in court established an equitable defense to defendants' arbitration right and entered judgment for plaintiff for the predetermined[7] $10,801.97 in damages, plus interest and costs. Reiterating his views that he took a "dim view of defendants' whirlygig positions during the course of the litigation" and that "such sophistry as [defendants] does not help a court in its futile efforts to keep up with an overcrowded docket," the district judge found that "advertently or inadvertently the court and plaintiff's counsel were led down a primrose path by a failure on the part of defendants' counsel to communicate to the court and opposing counsel in a timely way the argument of defendants that the dispute was one subject to arbitration." (I R. 86). Having found that *"defendants acquiesced in setting the case for trial"* and that "their pretrial statement cheerfully estimated the length of trial to be held" (I R. 90), the court noted that even after their suggestion to dismiss "defendants made no offer to obtain nor did they agree to submit to binding arbitration." (I R. 92) (Emphasis added).

Though observing that "the unfortunate results may have been largely inadvertent rather than intentional" (I R. 93), the court found that the "impact on the court and on plaintiff were the same no matter what the intent of defense

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[6]Continued

> In sum we conclude that the enumerated equitable defenses discussed are, in general, mandated by *Flair Builders* to the arbitrator for determination of the continued vitality of the contractual arbitration process. However, if such defenses arise solely during the course of the judicial process the arbitrator is not the one to determine whether the judicial process has been abused by either party or at all or whether an equitable defense to the main dispute has been established during the course of the judicial trial by in-trial conduct.

[7]The trial judge had already made findings on damages before the first appeal. (*See*, III R. 312-13). These findings are not challenged in the second appeal.

counsel. The pleadings and briefs filed for defendants were evasive and dilatory, and whether they were so because of intent or as a result of negligence, plaintiff and the court were lulled into a belief that defendants wanted the court to try the lawsuit, and that's what the court did." (*Id.*).

Finally, noting that "[t]he unions played games with plaintiff and the court too long to now insist on an injunctive order requiring plaintiff to arbitrate this stale dispute," the court concluded that "the record in this case demonstrates that the conduct of defendants *in this case in this court* establish the equitable defenses to arbitration mentioned by Chief Judge Lewis." (*Id.*).

This timely appeal follows, and we focus mainly on the findings and the holding against defendants' right to arbitration.

II

In urging reversal of the district court, defendants argue that they did not waive their right to assert the arbitration defense either by not moving for a stay or by participating in the litigation. More specifically, defendants contend that they raised their arbitration defense in a timely and proper fashion and without intentional misrepresentation of Local 1340's contract status; that the initial denial of Local's party status was made in good faith; and that, in any event, Burton has suffered no prejudice from the delay in demanding arbitration. Mere delay, they say, does not constitute waiver, absent such a showing of prejudice; defendants were not obligated to move for a stay; and the mere filing of a counter-claim does not waive the defense.

Defendants further contend that since alternative pleading is proper, a party need not rely exclusively upon the arbitration provisions of the contract, but may also seek damages for breach in the same action. It is not the inconsistency of these pleadings, but rather any prejudice flowing

therefrom, which determines the waiver issue. Thus "the counterclaim, rather than abandoning the arbitration defense, underscored its presence as an important element in the action."

We cannot agree that these points call for reversal of the trial court's findings. Generally, the parties to a contract can agree to settle disputes arising thereunder by arbitration. Indeed, the federal policy is to promote industrial stabilization through the collective bargaining agreement, and a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the agreement. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578. However, the right to arbitration, like any other contract right, can be waived. *Cornell & Company v. Barber & Ross Company*, 360 F.2d 512, 513 (D.C. Cir.), *aff'g.*, 242 F. Supp. 825 (D.D.C.). There is no set rule as to what constitutes a waiver or abandonment of the arbitration agreement; the question depends upon the facts of each case and usually calls for a finding by the trier of the facts. *Burton-Dixie Corp. v. Timothy McCarthy Const. Co.*, 436 F.2d 405, 408 (5th Cir.).

In determining whether a party to an arbitration agreement, usually a defendant, has waived its arbitration right, federal courts typically have looked to whether the party has actually participated in the lawsuit or has taken other action inconsistent with his right, *Cornell & Company v. Barber & Ross Company, supra*, 360 F.2d at 513; whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit by the time an intention to arbitrate was communicated by the defendant to the plaintiff, *Cornell & Company*, 242 F.Supp. at 826 (D.C.C.), *aff'd*, 360 F.2d 512; whether there has been a long delay in seeking a stay or whether the enforcement of arbitration was brought up when trial was near at hand, *General Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924, 928 n.4 (5th Cir.); *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 413 (2d Cir.), *cert. dismissed*, 364

U.S. 801; *American Locomotive Co. v. Chemical Research Corp.*, 171 F.2d 115, 121 (6th Cir.), *cert. denied*, 336 U.S. 909; *E.T. Simonds Const. Co. v. Local 1330 of Int. Hod Carriers, etc.*, 315 F.2d 291 (7th Cir.); *Radiator Specialty Co. v. Cannon Mills*, 97 F.2d 318 (4th Cir.).

Other relevant factors are whether the defendants have invoked the jurisdiction of the court by filing a counterclaim without asking for a stay of the proceedings, *American Locomotive Co. v. Chemical Research Corp., supra*, 171 F.2d at 121; *Radiator Specialty Co. v. Cannon Mills, supra*, 97 F.2d at 319; *Hilti, Inc. v. Oldach*, 392 F.2d 368, 370-71, 372 n.9 [*e.g.*, taking advantage of judicial discovery procedures not available in arbitration, *see Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 n.7 (2d Cir.)] had taken place, *Kulukandis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 989 (2d Cir.); and whether the other party was affected, misled, or prejudiced by the delay, *Kulukandis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978; *Local 198, United Rubber, C. L. & P. Wkrs. v. Interco, Inc.*, 415 F.2d 1208, 1211-12 (8th Cir.); *Carcich v. Rederi A/B Nordie, supra*, 389 F.2d at 696.

In *Burton-Dixie, supra*, the Fifth Circuit confronted the waiver issue in a context substantially similar to the present one. There defendant in its answer did not ask the court to stay proceedings pending arbitration, but rather denied liability, set up as an affirmative defense plaintiff's failure to arbitrate, impleaded two third-party defendants, and proceeded to litigate the substantive dispute. The court concluded that the factfinder (there a jury) could reasonably find that defendant waived its right to insist on arbitration. *Id.*, 436 F.2d at 409; *see also American Locomotive, supra*, at 115.

Viewed against the above principles and decisions, we cannot say that the finding of waiver by defendants District Council and Local 1340 was clearly erroneous. We note the initial and consistent denial for one year of Local's status as a party; the ambiguous or confusing ultimate stance on this

point; defendants' participation in numerous hearings, pretrial conferences, motions and other pleadings, and the deposing of witnesses; and their assertion of the arbitration clause merely as a defense in bar and a counterclaim, without insisting upon or demanding immediately, as was their duty, *see Radiator Specialty*, 97 F.2d at 319, enforcement of that provision.

Among other things, the defendants-appellants argue that there was no prejudice to Burton resulting from their actions in court. While it is true that the trial court made no specific finding of prejudice, the sum and substance of those findings as a whole is one of prejudice and detriment to Burton. Admittedly it was not until the day of trial when mandatory injunctive relief was requested by defendants, which clearly signaled their position that they desired the decision of an arbitrator instead of the court. The preparations until that time for trial in the court do, in our opinion, amount to sufficient prejudice that it is inequitable for a party at that point to shunt the controversy over to the arbitration procedures. See *American Locomotive Co. v. Chemical Research Corp., supra*, 171 F.2d at 121.[8]

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[8]In *American Locomotive, supra*, 171 F.2d 115, the defendants filed an answer and counterclaim denying the material allegations of the complaint; set up six special defenses, one of which pleaded the arbitration clause as a bar to plaintiff's action; declined to move for a stay at the outset; and participated in extensive proceedings in the case, including pleadings, motions, agreed orders, and expensive discovery procedures, before insisting on arbitration.

We have noted *Controlled Sanitation Corp. v. Machinists District 128*, 524 F.2d 1324 (3d Cir.), *cert denied*, 424 U.S. 915, but doubt the persuaveness of the majority position there. In any event the case seems distinguishable. The majority opinion there noted specifically, *id.* at 1326 n.3, that while the unions had taken a position that there was no collective bargaining agreement, they clearly reserved the right that the dispute should be submitted to arbitration, should the court find otherwise. That is not the case here. While the defendants were asserting their changing positions concerning the agreement they did not, until the day of trial, assert as either a primary or alternative position a request for a stay or for an order for arbitration.

The findings of the trial court on the defendants' conduct must be accepted unless they are clearly erroneous. *See Sheet Metal Wkrs. Int. Ass'n V. Los Alamos Const.*, 550 F.2d 1258, 1265 (10th Cir.). We conclude that the court's findings here were not clearly erroneous and that its holding that defendants' conduct in the court proceedings prevented assertion of their arbitration right was not in error. Accordingly, the judgment is

AFFIRMED.

APPENDIX C

SELECTED PLEADINGS[1]

I. Respondent Burton's Complaint for Damages and Injunction (July 13, 1973)

COMES NOW the Plaintiff, Reid Burton Construction, Inc., by its attorneys, Law Offices of Robert G. Good, Denver, Colorado, and for a cause of action against Defendants alleges and states as follows:

1. Plaintiff is a corporation organized under and existing by virtue of the laws of the State of Colorado, with principal office and place of business at Fort Collins, Colorado.

2. Defendants, and each of them, are labor organizations within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq. Defendant Local 1340 has its principal office at Fort Collins, Colorado, Defendant Carpenters District Council of Southern Colorado has its principal office at Colorado Springs, Colorado, and Defendant Colorado Building and Construction Trades Council has its principal office at Denver, Colorado.

3. Defendants, and each of them, represent employees in an industry affecting commerce and Plaintiff is an employer in an industry affecting commerce, as that term is defined in the National Labor Relations Act, 29 U.S.C. §152.

4. Jurisdiction over this action is granted the Court by the provisions of 29 U.S.C. §185.

5. Plaintiff and Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International

[1]Relevant pleadings, or portions thereof, are included in Appendix C, Respondent has deleted party captions, signatures, signature pages and certificates of service. The pleading was filed in the United States District Court for the District of Colorado on the date following the caption of the pleading.

Brotherhood of Carpenters and Joiners of America, AFL-CIO, are parties to a collective bargaining agreement known as "Carpenters' Agreement, Carpenters District Council of Southern Colorado." At all times material herein such collective bargaining agreement was in full force and effect and governed the relationship between the aforementioned parties.

6. Said collective bargaining agreement contains promises by Local 1340 and by the Carpenters District Council of Southern Colorado that they and their members will not strike or picket the Plaintiff during the term of the agreement. Said collective bargaining agreement further defines the relationship of the Plaintiff to Plaintiff's contractors or subcontractors on construction sites in so far as all the requirements, conditions and intents of the said collective bargaining agreement applies to said contractors or subcontractors of Plaintiff.

7. Defendant, Colorado Building and Construction Trades Council, is an unincorporated association and an amalgamation of numerous labor organizations in the building and construction industry in the State of Colorado, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado. Defendant Colorado Building and Construction Trades Council is authorized by its constituent unions, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, to represent them for purposes relating to labor relations, and as such the Defendant Colorado Building and Construction Trades Council is an agent of its constituent unions.

8. On or about February 25, 1973, a representative of Defendant Colorado Building and Construction Trades Council, submitted to Plaintiff herein for its requested signature a labor agreement which would require, inter alia, that Plaintiff contract only with union subcontractors in the future on all its construction sites, which union subcontractors must have signed union agreements with the various construction trades, including subcontractors performing carpenter work.

9. When Plaintiff refused to sign the labor agreement described above in paragraph eight, Defendant Colorado Building and Construction Trades Council commenced picketing a Fort Collins construction site of Plaintiff on or about March 8, 1973 and continued to do so until on or about March 16, 1973. On or about April 3, 1973, and continuing to on or about April 13, 1973, such picketing was resumed by Defendant Colorado Building and Construction Trades Council where the object thereof was to force Plaintiff to sign the submitted labor agreement.

10. The picketing described above in paragraph nine was implicitly and/or expressly authorized by and/or ratified by the constituent labor organizations which are members of the Colorado Building and Construction Trades Council, including Defendants Local 1340 and Defendant Carpenters District Council of Southern Colorado, and at all times Defendant Colorado Building and Construction Trades Council was acting within the scope of its authority from its members.

11. During the period of the picketing described above in paragraph nine, Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, by its representatives, induced, encouraged or coerced its employee members to cease performing work for Plaintiff on the subject construction site and otherwise endorsed, enforced and supported the picket of Defendant Colorado Building and Construction Trades Council.

12. The picketing of Defendant Colorado Building and Construction Trades Council, as described above in paragraph nine, resulted in Plaintiff's construction site being temporarily shut down in whole or in part during the period of said picketing, thus subjecting Plaintiff to monetary losses in the approximate amount of $1,000.00 per day, which amount cannot be definitely ascertained at this time, but will be at the time of trial of this cause.

13. The labor agreement submitted for signature by Defendant Colorado Building and Construction Trades Council, as agent for Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, among others, would require Plaintiff to conduct his business at its construction sites relative to labor relations in a manner that is not required under its existing agreement with Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado. By the action of the Defendant Colorado Building and Construction Trades Council as agent for Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, the two aforementioned Carpenter Defendants are attempting to change the provisions of their existing collective bargaining agreement and thus have violated the terms of that agreement and have caused Plaintiff damages in their attempt to make such change.

14. The action of Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado in endorsing and supporting the picket line established by its agent, Defendant Colorado Building and Construction Trades Council, and the action of the two Carpenter Defendants aforementioned in inducing and encouraging and/or coercing its members to refuse to work for Plaintiff, also constitutes a breach of their contract promises not to strike or picket Plaintiff during the term of their collective bargaining agreement. By such action, the two Carpenter Defendants further contributed to the damages suffered by Plaintiff as described above.

15. Defendant Colorado Building and Construction Trades Council, by its representatives, continues to request Plaintiff to sign its labor agreement as described above, and continues to threaten to picket Plaintiff as done previously where the object thereof is to force Plaintiff to sign said agreement and it can be reasonably anticipated that unless enjoined, Defendant Colorado Building and Construction Trades Council, as agent for the two Carpenter Defendants herein, will continue to do so.

WHEREFORE, Plaintiff prays this Honorable Court to enter judgment in favor of Plaintiff against all Defendants jointly and severally, in the approximate amount of $16,000.00 to compensate Plaintiff for its monetary losses during said picketing, such amount to be more definitely ascertained at the time of the trial of this action. The Court is further requested to enter an order forever restraining Defendant Colorado Building and Construction Trades Council, as agent for the two Carpenter Defendants herein, from picketing Plaintiff where the object thereof is to force or require Plaintiff to sign the aforementioned labor agreement; the Court is further requested to restrain Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado from authorizing the Defendant Building Trades Council to picket Plaintiff or to solicit Plaintiff's signature on the subject labor agreement, and from supporting and endorsing the picket line of Defendant Building Trades Council and from inducing, encouraging and/or coercing their members to respect the picket line of said Building Trades Council.

FURTHER, this Court is urged to award Plaintiff reasonable attorney's fees, costs, interest, and such other and further relief as this Court may deem proper.

II. Excerpts from Respondent Burton's Amended Complaint (September 14, 1973)

COMES NOW the Plaintiff, Reid Burton Construction Inc., by its attorneys, Law Offices of Robert G. Good, Denver, Colorado, and for a cause of action against Defendants alleges and states as follows:

* * * * * *

5. Plaintiff and Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, AFL-CIO, are parties to a collective bargaining agreement known as "Carpenters' Agreement, Carpenters District Council of

Southern Colorado." At all times material herein such collective bargaining agreement was in full force and effect and governed the relationship between the aforementioned parties.

III. Excerpts from Petitioners' Answer and Counterclaim (November 9, 1973)

ANSWER

COMES NOW the defendants, Carpenters District Council of Southern Colorado and Local 1340 of International Brotherhood of Carpenters and Joiners of America, by their attorneys, Hemminger, McKendree, Vamos & Elliott, P.C., and file the within Answer and Counterclaim to the Amended Complaint in this matter as follows:

* * * * *

5. The above named defendants deny the allegations contained in paragraph 5 of the Amended Complaint. By way of further answer, the above named defendants aver that plaintiff and defendant Carpenters District Council of Southern Colorado are parties to a collective bargaining agreement known as "Carpenters Building Construction 1972-75 Agreement" effective May 1, 1973 until April 30, 1975. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement.

* * * * *

COUNTERCLAIM

1. Defendant Carpenters District Council of Southern Colorado is a labor organization within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq., is an unincorporated association, and has its principal office in Colorado Springs, Colorado.

2. Defendant Carpenters District Council of Southern Colorado represents employees in an industry affecting commerce and plaintiff is an employer in an industry affecting commerce, as that term is defined in the National Labor Relations Act, as amended, 29 U.S.C. §152.

3. Plaintiff is a corporation organized under and existing by virtue of the laws of the State of Colorado with principal office and place of business at Fort Collins, Colorado.

4. Jurisdiction over this Counterclaim is granted the Court by the provisions of 29 U.S.C. §185.

5. Plaintiff and defendant Carpenters District Council of Southern Colorado are parties to a collective bargaining agreement known as "Carpenters Building Construction 1972-75 Agreement" effective May 1, 1972 to, through, and including April 30, 1975.

6. Said collective bargaining agreement provides in Article XIII entitled "Contractural [sic] Disputes" a mandatory dispute settlement procedure culminating in a Board of Adjustment hearing and selection of an impartial chairman. Said Board of Adjustment has final and binding authority to resolve disputes involving the application or interpretation of the terms of said agreement.

7. A dispute involving the application or interpretation of the above mentioned agreement within the meaning of Article XIII, Section 1 of said agreement has arisen between the plaintiff and defendant Carpenters District Council of Southern Colorado in that plaintiff alleges in its Amended Complaint that said defendant has violated Article XIII, Section 5 pertaining to strikes, work stoppages, etc. and Article IV pertaining to subcontracts.

8. In accordance with Article XIII of the above mentioned collective bargaining agreement, plaintiff has a mandatory obligation at the time the above described dispute

arose to utilize the dispute settlement procedures provided for in said article, and the plaintiff's failure to abide by the terms of said article constitute an express violation of said collective bargaining agreement, thereby giving rise to the express right in the defendant Carpenters District Council of Southern Colorado to take appropriate economic action against the plaintiff.

9. By commencing the within lawsuit against defendants Carpenters District Council of Southern Colorado and Local 1340 for breach of their contractual promises not to strike and for violating their agreement by attempting to change the provisions of Article IV entitled "Sub-contractors" of the above mentioned collective bargaining agreement, the plaintiff has flagrantly disregarded its mandatory obligation to abide by the contractual dispute settlement procedures set forth in said collective bargaining agreement, and the plaintiff violated the express terms of Article XIII of said collective bargaining agreement.

10. As a proximate result of plaintiff's above described breach of the above mentioned collective bargaining agreement, the defendant has suffered damages including, inter alia, the cost of defending the within lawsuit.

WHEREFORE, defendant Carpenters District Council of Southern Colorado prays that this Honorable Court grant the following relief:

1. That judgment be entered in favor of the defendant Carpenters District Council of Southern Colorado against the plaintiff and that the defendant be awarded all costs incurred, including reasonable attorney's fees, in defending the within lawsuit.

2. That the Court award defendant such other and further relief as this Court may deem proper.

IV. Excerpts from Respondents' Reply to Counterclaim (December 5, 1973)

SECOND DEFENSE

As a further defense to Defendants' Counterclaim, Plaintiff affirmatively alleges that Defendants have waived any right they may have to make the instant Counterclaim and Defendants are thereby estopped from doing so by their conduct.

FIFTH DEFENSE

As a further defense to Defendants' Counterclaim, Plaintiff affirmatively alleges that Defendants' Counterclaim is barred by the application of the doctrine of laches.

V. Excerpts from Petitioners' Amended Answer and Counterclaim (March 11, 1974)

COME NOW the defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, by their attorneys, Hemminger, McKendree, Vamos & Elliott, P.C., and file the within Amended Answer and Counterclaim to the Amended Complaint in this matter as follows:

* * * * *

5. The above named defendants deny the allegations contained in paragraph 5 of the Amended Complaint. By way of further answer, the above named defendants aver that plaintiff and defendant Carpenters District Council of Southern Colorado are parties to a collective bargaining agreement known as "Carpenters Building Construction 1972-75 Agreement" effective May 1, 1973 until April 30, 1975. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement.

VI. Excerpts from Petitioners' Pre-Trial Statement (March 11, 1974)

* * * * *

5. (A) GENERAL NATURE OF THE CLAIMS OF THE PARTIES

b. Defendants' Claim

The Plaintiff contends that the Defendant Carpenters' unions have a labor agreement with the Plaintiff which contains a promise not to strike or picket the Plaintiff and that said promise was violated by the picketing of the Colorado Building Construction Trades Council in March and April, 1973 because the Trades Council was acting as the agent of the Carpenter Defendants at this time. In addition, the Plaintiff also contends that the Carpenter Defendants coerced their members into not working for Plaintiff during this same period and thereby directly violated the no-strike promises contained in the collective bargaining agreement with the Plaintiff.

The Defendant Carpenter unions deny Plaintiff's allegation of direct and indirect violation of the Carpenters' collective bargaining agreement, which is known as the "Carpenters' Building Construction 1972-75 Agreement." It is the Defendant Carpenter unions' position that the Colorado Building Construction Trades Council is a separate and distinct labor organization with its own purposes and goals and that in submitting its own subcontract agreement to the Plaintiff for signature and in conducting picketing against Plaintiff in March and April, 1973, the Colorado Building Construction Trades Council was acting on its own initiative pursuing its own goals and was not acting as the agent of the Carpenter Defendants herein. The Defendant Carpenters District Council of Southern Colorado is a party to the aforementioned collective bargaining agreement with the Plaintiff, but is not a member of the Colorado Building Construction

Trades Council and, therefore, has no agency relationship to the Trades Council. On the other hand, Defendant Local 1340 is an affiliate of the Colorado Building Construction Trades Council, but neither it nor the Defendant Carpenters District Council of Southern Colorado authorized or ratified the Trades Council picketing. Furthermore, the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with the Plaintiff.

* * * * *

(B) UNCONTROVERTED FACTS

The Defendants above-named contend that the following facts are uncontroverted:

1. Plaintiff and Defendant Carpenters District Council of Southern Colorado are parties to the collective bargaining agreement known as "Carpenters' Building Construction 1972-75 Agreement."

* * * * *

5. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement, whereas Carpenters District Council of Southern Colorado is a party to said agreement.

VII. Petitioners' Suggestion to Dismiss Pursuant to Rule 12(h)(3) (July 18, 1974)

COME NOW the Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, and move this Honorable Court to Dismiss the above-captioned Action on the grounds that the Court lacks jurisdiction over the subject matter because the Pleadings and the Depositions on file show on their face that the controversy described therein is one within the exclusive jurisdiction of an arbitrator selected

and acting pursuant to the provisions of Article XIII of the collective bargaining agreement upon which this Action is based.

VIII. Excerpts from Petitioners' Brief in Support of Suggestion to Dismiss Pursuant to Rule 12(h) (3) (July 18, 1974)

PRELIMINARY STATEMENT

COME NOW the Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, by and through its attorneys, the LAW OFFICES OF JOHN W. McKENDREE, and suggest pursuant to Rule 12(h)(3) of the Fed.R.Civ.P. that this Court is without jurisdiction over the subject matter of the within controversy and hence should Order dismissal of the Action. Bank, v. U.S., 16 F.R.D. 310, 312-313 (S.D. Calif. 1954). See also Arcaya v. Estrada, 24 F.R.Serv. 12 h.234, Case 1 (S.D.N.Y. 1957).

ARGUMENT

THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE INSTANT DISPUTE BECAUSE: (1) THE DISPUTE IS SUBSTANTIVELY ARBITRABLE; (2) THE FINAL AND BINDING ARBITRATION PROCEDURES PROVIDED FOR IN THE COLLECTIVE BARGAINING AGREEMENT ARE AVAILABLE TO THE PLAINTIFF; and (3) THE PLAINTIFF FAILED TO UTILIZE SUCH PROCEDURES BEFORE INSTITUTION OF THE PRESENT ACTION.

* * * * *

Although heretofore the Defendants have questioned whether the Defendant Local 1340 was a party to the collective bargaining agreement entered into by Reid Burton and the Carpenters District Council of Southern Colorado, the Defendants herein

state that Local 1340 is subject to the terms and provisions of the agreement. Consolidation Coal Co. v. United Mine Workers, Local 5869, 362 F.Supp. 1073 (S.D.W.Va. 1973). As a consequence, both Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 would be bound by an arbitral award issued in accordance with the provisions of Article XIII of the collective bargaining agreement.

IX. Excerpts from Respondent's Reply to Petitioners' Suggestion To Dismiss and Motion for All Costs and Fees (August 2, 1974)

II. PLAINTIFF REID BURTON'S POSITION

The position of Plaintiff Reid Burton in response to the "Suggestion to Dismiss" is three-fold:

1. Under United States Supreme Court decisions, this Court still has jurisdiction of the subject matter.

2. In the event this Court grants the "Suggestion to Dismiss" for lack of jurisdiction over the subject matter, this Court must award damages (including *inter alia*, costs of suit, attorney fees, witness fees and deposition costs) to Plaintiff and its representatives, and to other parties, and to the Court itself, for the time and effort thus far wasted by all concerned. Therefore, this Court is requested to order a hearing on every penny of damages arising out of the evasive and dilatory procedural and substantive legal gymnastics of the Defendant Unions.

3. In the event the Court agrees with Plaintiff that it still retains subject matter jurisdiction, the Court should order an award of attorney's fees and costs to the Plaintiff Company for the time its attorneys have spent in responding to the instant "Suggestion to Dismiss."

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

REID BURTON CONSTRUCTION, INC., a Colorado corporation, Plaintiff, vs. CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, LOCAL 1340 of the UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL, unincorporated associations and labor organizations, Defendants.	)	CIVIL ACTION NO. C-5184

MEMORANDUM OPINION

WINNER, Judge

By amended complaint brought under 29 U.S.C. §185, plaintiff sought damages against (a) Carpenters District Council of Southern Colorado, (b) Local 1340 of the International Brotherhood of Carpenters & Joiners of America, AFL-CIO, and (c) Colorado Building and Construction Trades Council. The amended complaint alleged in material part:

"5. Plaintiff and Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, AFL-CIO, are parties to a collective bargaining agreement known as 'Carpenters' agreement, Carpenters District Council of Southern Colorado.' *At all times material herein such collective bargaining agreement was in full force and effect and governed the relationship between the aforementioned parties.* [emphasis supplied].

"6. Said collective bargaining agreement contains promises by Local 1340 and by the Carpenters District Council of Southern Colorado and (sic) they and their members will not strike or picket during the term of the agreement . . . .

"7. . . . Defendant Colorado Building and Construction Trades Council is authorized by its constituent unions, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, to represent them for purposes relating to labor relations, and as such the Defendant Colorado Building and Construction Trades Council is an agent of its constituent unions."

By order of November 23, 1973, Colorado Building and Construction Trades Council was dismissed from the case under rules of contract and agency law, because, "Under the averments of the complaint here, and taking into account the actual parties to the contract, it can be said that Colorado Building and Construction Trades Council is concerned with this dispute only as an agent for a disclosed principal."

The other two defendants answered, and in paragraph 5 of the amended answer it is said:

"5. *The above named defendants deny the allegations in paragraph 5 of the Amended Complaint.* By way of

> further answer, the above named defendants aver that plaintiff and defendant District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreement. . . . As a consequence, both Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 would be bound by an arbitral award issued in accordance with the provisions of Article XIII of the collective bargaining agreement."

July 10, 1974, the Local said that it *is* bound by the contract and that the dispute is subject to arbitration and that the case should be dismissed. Defendants argue that they have not changed their position, and they explain that the time spent by plaintiff's counsel and the court in preparing the case for trial was wasted time because plaintiff's counsel and the court should have read more literally defendants' assertions that Local 1340 was not a party to the contract and should not have been taken aback by defendants' July 10, 1974, assertion that the non-party local was bound by a contract to which it is not a party, and this even though defendants had denied that they were governed by the agreement. I have said on the record and I repeat here that sophistry such as this does not help a court in its futile efforts to keep up with an over-crowded docket.

Another pretrial conference was held after the suggestion to dismiss was filed, and the pretrial order contains the following partial statement of defendants' position as to the court's jurisdiction:

> "Although the Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 submit that this Court does not have jurisdiction under Section 301 to reach the merits of the Plaintiff's claims for breach of contract, this Court does have threshold jurisdiction under Section 301 to determine whether the provisions of Article XIII of

the collective bargaining agreement provide for final and binding arbitration of the subject matter of Plaintiff's claim. Threshold jurisdiction for this determination lies under Section 301 because Plaintiff's claim involves an alleged violation of a contract between an employer and a labor organization. Furthermore the stance that the existence of applicable arbitration provisions deprives this Court of subject matter jurisdiction is not inconsistent with the stance that the Court has threshold jurisdiction under Section 301. Simply stated, the Court has jurisdiction to determine whether the Plaintiff's claims of breach of contract are substantively arbitrable, but once such claims are determined to be substantively arbitrable, the jurisdictional grant of authority under Section 301 ceases."

With this latest version of defendants' ever changing position being filed a scant week in advance of the trial date, the case proceeded to trial on all issues, the case was taken under advisement and post trial briefs were allowed. They have been filed, and, having been beleagured by this case to the extent that I have, I shall make findings and conclusions on all questions directly or indirectly, and properly or improperly before me. I do this to avoid if possible any risk of having to try the case all over again if the Court of Appeals disagrees with my conclusions.

Plaintiff and Carpenters District Council of Southern Colorado are parties to a labor contract, and defendant Local 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO has now made a judicial admission that it is bound by that contract. Article XIII of the contract is the important article here. It provides in material part:

"ARTICLE XIII

"CONTRACTURAL DISPUTES

"Section 1 — In the event that a dispute arises involving the application or interpretation of the terms of this agreement, reasonable and diligent effort shall be exerted by the employee with the employer's representative, the employee contacting the business representative through the steward, and/or the business representative with the employer's representative. If the two parties are unable to reach a settlement, the dispute shall be reduced to writing and the aggrieved party shall notify the other party the dispute is being referred to a Board of Adjustment.

"Section 2 —The Board of Adjustment shall be composed of two representatives selected by the employer from contractors signatory to this agreement and two representatives selected by the union. The Board of Adjustment shall meet not later than five (5) working days after a grievance has been presented to it.

"Should the Board of Adjustment be unable to render a majority decision after convening and hearing the dispute, the Board shall, within 48 hours, select an impartial chairman who is not directly connected with the building or construction industry, either as contractor or union. Should the parties be unable to agree on the selection of the chairman within said 48 hours, the same shall be selected from a panel of five (5) names submitted by the director of the Federal Mediation and Conciliation Service in Washington, D.C. The party initiating the dispute shall strike first on said list.

"**Section 3** — The majority decision of the Board of Adjustment shall be final and binding upon each party to the dispute in each instance and shall be within the scope and terms of this agreement.

. . . . . .

"**Section 5** — The parties agree that there shall be no strike, work stoppage, slowdown, lockout or other interruption of the continuity of the work in progress during the life of this Agreement unless a party refuses to abide by or to implement the majority decision of the Board of Adjustment."

While the contract was in full force and effect, and while plaintiff was living up to all of its terms, Colorado Building and Construction Trades Council wrote a letter to plaintiff which said:

"Gentlemen:

"We are presently engaged in a program to standardize wages and working conditions in the construction industry in this area. To assist in accomplishing this, we are requesting builders and general contractors to sub-contract jobsite work only to contractors who are parties to a contract with one of the unions affiliated with our council. A proposed draft of such agreement is enclosed for your consideration. You will note that it applies only to future work for which no sub-contract has been executed. Your signing of the proposed agreement would therefore not require you to terminate the services of any contractor for any job which is already under contract.

"We intend to acquaint the public, by means of picketing and other forms of communication, with

the names of builders and general contractors who do not enter into our sub-contracting agreement. In the event that your company is the subject of such picketing, it will be conducted at your general offices and other places in which you may be engaged in business. The picketing will be directed to the public, and not to your contractors, suppliers, or employees. Its sole purpose will be to contest your right to the goodwill of the community. We wish to emphasize that we are not requesting or seeking, and do not desire, you to cease or refrain from doing business with any person, firm or corporation. Nor do we claim to represent, or seek or organize, any of your employees, and we do not request or desire your recognition as their representative.

"If you have any comment or question concerning this matter, please communicate the same by letter, which will be referred to our Executive Board for appropriate consideration and action. Neither the undersigned, nor any other person, has authority to discuss this matter in behalf of the union."

Plaintiff didn't go along with the request of the Building and Construction Trades Council, and, true to its word, pickets showed up at two of plaintiff's jobs in Fort Collins, Colorado, (a) the Everitt Office Building job, and (b) the Markley Motors job. Leaflets were handed out by the pickets, and these leaflets said:

"MESSAGE TO THE PUBLIC

"We are picketing REID BURTON because of his refusal to sign a sub-contracting agreement for future job site work. If you believe in the cause of fair wages and working conditions for American workers, please telephone or write to Reid Burton and request him to sign our sub-contracting agreement for future job site work.

"Our picket is not directed against any other employer, and we have no dispute with any other employer on this project.

"Thank you!

"COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL

"The person giving you this leaflet is not authorized to discuss this or any other matter in behalf of the Colorado Building and Construction Trades Council."

Additionally, signs were posted which read:

"REID BURTON CONST. CO. Has No Contract With Colorado Building & Constr. Trades Council. We have no dispute with any other person or Co. on the project."

A responsible officer of the Local admitted to a representative of plaintiff that there was no claim by defendants of a contract violation by plaintiff, and defendants made a tongue in cheek disavowal any intention of a strike. However, for the most part the carpenters didn't show up for work, and defendants say that their failure to work was not because of any strike, but, rather, the men's conduct was purely "voluntary" individual action. Defendants assert that they neither influenced, persuaded or coerced the union carpenters not to work. The record belies defendants' pious contentions. Two of the union carpenters didn't "voluntarily" stay away from work. They made the mistake of voluntarily showing up for work. Retribution was swift. The business representative of Local 1340 filed charges against each of the carpenters who didn't "voluntarily" stay home. They were charged with, "Working behind a picket line duly authorized by a subordinate body of the United Brotherhood (Building and Construction Trades Picket) Working on Markley Motors

Building, South College Avenue, Fort Collins, Colorado, 80521, on or about the 13th of March, 1973." To add insult to injury, although one of the carpenters lived in Longmont and the other in Ft. Collins, Colorado, their trial was held in Montrose, Colorado. As sure as death and taxes, they were convicted and fined, but as a result of later N.L.R.B. action, the fines were set aside. Although I have admitted to naivete in relying on the good faith of counsel, I am not so gullible as to accept defendants' protestations of innocence of violation of the no strike clause of the contract. Communications between all three named defendants were open at all times, and the entire episode was one of tripartite self help. The record in this case convinces beyond peradventure that Carpenters District Council of Southern Colorado violated the no strike clause of the labor contract to which it was a party and that Local 1340 of the International Brotherhood of Carpenters & Joiners of America, AFL-CIO violated the same provision of the same contract which the local has now judicially admitted was binding on it. The defendants flagrantly violated the contract jointly and severally.

Plaintiff sustained damage as a result of those violations. The fact of damage is certain, although the amount of damage is somewhat less certain. Defendants did not controvert the damage testimony, and the record made in this case permits a finding, and I find that as a result of defendants' contract violations, plaintiff was damaged in the amount of $6,392.52 on the Markley Motors job and in the amount of $4,409.45 on the Everitt job. Thus plaintiff was damaged in the total amount of $10,801.97 as a direct and proximate result of defendants' flagrant violations of the contract's provisions.

Having found that defendants broke their promise not to strike and having found the amount of damages resulting to plaintiff as a result of defendants' breach of contract, I must face up to the question of whether I have jurisdiction to enter judgment against defendants. To do this, I must decide whether the arbitration clause covers the dispute and makes

arbitration mandatory, and, I must decide whether because of waiver, repudiation, estoppel, laches or any other reason, the matter should not be sent to an arbitrator for decision.

The scope and effect of the arbitration clause in question must be decided under *Drake Bakeries v. Bakery Workers* (1962) 370 U.S. 254, and *Atkinson v. Sinclair Refining Co.* (1962) 370 U.S. 238, opinions by Justice White handed down the same day. *Atkinson* held that only employee grievances were subject to arbitration, while *Drake Bakeries* held that all contract disputes had to be arbitrated. In *Atkinson*, Justice White explained:

> "In Drake Bakeries, Inc. v. Local 50, post, decided this day, the question of arbitrability of a damage claim for breach of a no strike clause is considered and resolved in favor of arbitration in the presence of an agreement to arbitrate 'all complaints, disputes or grievances arising between them [i.e. the parties] involving . . . any act or conduct re relation between the parties."

Admittedly, Article XIII of the Carpenters' contract is not word for word with either *Atkinson* or *Drake Bakeries*, and plaintiff says that it is more comparable to *Atkinson* than it is to *Drake Bakeries*. Defendants, of course, take the opposite position. Without extended discussion, but after much thought, and after study of the many Supreme Court cases favoring arbitration, I must reluctantly agree with defendants, and I hold that the dispute is encompassed within the mandatory arbitration provisions of the labor contract in question.

The question then arises as to whether defendants can insist on arbitration in light of their conduct leading up to and during this case. That is to say, are defendants prevented from insisting on arbitration under principles of waiver,

repudiation, estoppel, laches or other equitable principles; and is this question to be decided by me or by an arbitrator? What I shall say presently will emphasize why I wholeheartedly agree with the views expressed by Justice Powell in *International Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders,* (1972) 406 U.S. 487, but Justice Powell was speaking in dissent joined in by the Chief Justice. I am bound by the majority view, and as I read *Flair Builders,* it is for the arbitrator to decide whether defendants can still insist on arbitration.

This conclusion presents the difficult question of whether I should dismiss this case or stay it pending arbitration. If I dismiss the case, plaintiff's appellate rights are certain, but if I stay it, plaintiff may have to go through an arbitration before it can appeal, and the Court of Appeals may hold that I am wrong in saying the disputes should be arbitrated. These factors argue in favor of dismissal.

On the other side of the coin, defendants have already made a 180 degree turn on the arbitrability question, and if I dismiss and plaintiff wants to arbitrate, defendants may make it a 360 degree turn. In this event, plaintiff would have to start all over again. Moreover, there is more than remote chance that the arbitrator will hold that under principles of waiver, repudiation, estoppel or laches, defendants cannot insist on arbitration. Should either of these eventualities come to pass, if the case has been dismissed, plaintiff would have to commence a new lawsuit. Indeed, if there be no limit on the rule of *Flair Builders,* a recalcitrant party can stall a dispute forever. These factors argue in favor of a stay.

My inclination is to order a stay of this case pending arbitration, but plaintiff is the one burdened with the dilemma stemming from defendants' stalling. Accordingly, I shall and I do order that this case be stayed pending arbitration of the questions, but, if plaintiff would prefer a dismissal to perfect an

appellate record, I will probably grant a motion to alter and amend these findings and conclusions in this regard.

Dated at Denver, Colorado, this 19th day of November, 1974.

/s/Fred M. Winner
United States District Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

REID BURTON CONSTRUCTION, INC., a Colorado corporation,	)	
Plaintiff-Appellant,	)	
v.	)	
CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, LOCAL 1340 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL, unincorporated associations and labor organizations,	)	No. 75-1149 (C-5184)
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES COURT FOR THE DISTRICT OF COLORADO

Robert G. Good, Denver, Colorado, for Appellant.

John W. McKendree, Denver, Colorado, for Appellees.

Before LEWIS, Chief Judge; SETH and McWILLIAMS, Circuit Judges.

LEWIS, Chief Judge.

Two clearly drawn but different issues are involved in this appeal: (1) Whether Reid Burton Construction's claim for damages arising out of the unions' alleged violation of the no-strike clause was arbitrable, and if so, (2) whether the unions, because of certain pleading and procedural tactics employed by them in the district court, were prevented by the equitable doctrines of waiver, estoppel, repudiation, or laches from asserting the arbitrability of Burton Construction's complaint. Finding both of these issues arbitrable, the district court dismissed the present action.

Since this appeal is not concerned with the merits of the underlying damage claim, we need only outline those facts which led to the filing of this action. Burton Construction, a signatory to a collective bargaining agreement with the Carpenters District Council of Southern Colorado and its affiliated local unions of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, was approached by the Colorado Building and Construction Trades Council to sign an agreement whereby it would only subcontract with other employers who were in contractual relationship to labor organizations affiliated with the Building Trades Council. Burton Construction refused to sign the agreement and the Building Trades Council picketed several of Burton Construction's building sites during parts of March and April of 1973.

In spite of a no-strike clause in the collective bargaining agreement, union carpenters refused to cross the picket lines. As a result, on July 13, 1973, Burton Construction filed this damage claim in district court against the Colorado Building and Construction Trades Council, the Carpenters District Council of Southern Colorado, and Local 1340 of the United Brotherhood of Carpenters and Joiners. All three of the defendants made motions to be dismissed from the lawsuit. The court did dismiss the Building Trades Council, but denied the similar motions of the District Council and Local 1340.

In their answers filed on November 9, 1973, the District Council and Local 1340 admitted jurisdiction under section 301 of the National Labor Relations Act as to the District Council, but asserted that "Local 1340 is not a party to the aforementioned collective bargaining agreement." Also in their answer, as an affirmative defense the District Council and Local 1340 alleged:

> This Court has no jurisdiction over the subject matter of this action because it involves the interpretation and application of the collective bargaining agreement . . . which is within the sole and exclusive province of the dispute resolution machinery contained therein which provisions contain the exclusive remedy for breaches thereof.

The unions also counterclaimed against Burton Construction alleging that it had breached the collective bargaining agreement by filing this action for failure to have first used the grievance and arbitration procedures contained in the agreement for processing disputes. In Burton Construction's answer to the counterclaim, it contended that the unions had waived their right to arbitration and that the counterclaim was barred because of laches.

More than a year after the complaint was filed, the unions admitted that while they did not consider Local 1340 to be a "party" to the collective bargaining agreement, they did consider it to be "bound by the substantive terms of the agreement." The case proceeded to a trial on October 1, 1974, wherein the trial court determined that both the alleged violation of the no-strike clause and the issue of whether estoppel, waiver, repudiation, or laches should prevent the unions from demanding arbitration were arbitrable issues. The trial court based the latter determination on its reading of Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487. The trial court initially intended to order a stay pending the arbitration of these two issues, but noted that if Burton Construction would

prefer, the court would dismiss the action in order to perfect the appellate record. Burton Construction opted for the latter and this appeal followed.

I.

The first issue of whether Burton Construction's damage claim for alleged breach of a no-strike clause was an arbitrable issue must be decided by a careful analysis of Drake Bakeries Inc. v. Local 50, Bakery Workers, 370 U.S. 254, and Atkinson v. Sinclair Refining Co., 370 U.S. 238. Both of these cases, which were decided the same day, were damage actions brought by employers against the unions for violations of no-strike or work stoppage provisions in the respective collective bargaining agreements. In each case the unions argued that the issues were arbitrable and that the courts should stay the actions pending arbitration. Basing its opinion on the intended scope and effect of each collective bargaining agreement, the Court reached different results.

The fact that the Supreme Court reached different conclusions in *Atkinson* and *Drake Bakeries* is consistent with its earlier observation in *Warrior & Gulf Navigation* where it stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582. Our first question therefore is one of contractual interpretation — whether a violation of the no-strike clause was intended by Burton Construction and the unions to be subject to Article XIII, the grievance and arbitration provisions of the collective bargaining agreement.

Neither *Drake Bakeries* nor *Atkinson* definitively answers our question, since the language of Article XIII falls somewhere in between the pertinent grievance and arbitration provisions in those cases. In *Atkinson*, the Court found it persuasive that the grievance and arbitration clause applied only to employee-initiated grievances and was not intended to

include "all of their possible disputes."[1] The applicable grievance provision in *Drake Bakeries*, however, was much more broadly written — it was to include "all complaints, disputes, or grievances arising between [the parties]" — and clearly indicated that either labor or management could process a grievance.[2] The standard of analysis used by the Court apparently fixes on two factors: (1) Whether the grievance and arbitration provisions were wholly employee and union initiated or could be initiated by either the

---

[1]The procedure for filing a grievance under the collective bargaining agreement in *Atkinson* clearly applied only to the employee- and/or union-initiated grievances:

> It is the sincere desire of both parties that *employee grievances* be settled as fairly and as quickly as possible. Therefore, when a grievance arises, the following procedure must be followed:
>
> 2. For the purpose of adjusting *employee grievances and disputes* as defined above, it is agreed that *any employee, individually or accompanied by his committeeman*, if desired shall:
>
> (a) Seek direct adjustment of any grievance or dispute with the foreman under whom he is employed. . . .
>
> (b) If the question is not then settled the employee may submit his grievance in writing, on forms supplied by Union . . . .

Quoted in Atkinson v. Sinclair Refining Co., 370 U.S. 238, 250 (emphasis added).

[2]Unlike the language in *Atkinson*, the grievance procedure in *Drake Bakeries* unequivocally was designed to allow either the employee or the employer to initiate grievance procedures:

> (a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

employees or the employer, and (2) whether disputes over the violation of no-strike clauses were intended by the parties to be subject to grievance and arbitration procedures.

Each of the cases that has ruled that a violation of a no-strike clause is not subject to arbitration has done so when the grievance and arbitration provisions were wholly employee and union initiated.[3] Burton Construction contends that Article XIII is wholly employee initiated, citing the following language:

> In the event that a dispute arises involving the application or interpretation of the terms of this

[2]Continued

> In the *adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management.* It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.
>
> (b) If the Committee and the Shop Management are unable to effect an adjustment, then the *issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party.* The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, *then either party shall have the right to refer the matter to arbitration as herein provided.*

Quoted in Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. 254, 257 N.2 (emphasis added.)

[3]*See, e.g.*, Friedrich v. Local 780, IUE, 5 Cir., 515 F_2 225; Faultless Division v. Local 2040, I.M. & A.W., 7 Cir., 513 F_2 987, 990; Affiliated Food Distributors, Inc. v. Local 229, Teamsters, 3 Cir., 482 F_2 418, *cert. denied*, 415 U.S. 916; Firestone Tire & Rubber Co. v. Rubber Workers Union, 5 Cir., 476 F_2 603, 605-06; G. T. Schjeldahl Co. v. Local 1680, Machinists, 1 Cir., 393 F_2 502; Boeing Co. v. UAW Local 1069, 3 Cir., 370 F_2 969.

> agreement, reasonable and diligent effort shall be exerted by the employee with the employer's representative, the employee contacting the business representative through the steward, and/or the business representative with the employer's representative [.]

We find this language ambiguous as to whether an employer can initiate a grievance, but in the context of the sentence immediately following the quoted language, it becomes apparent that the parties intended that either party could process a grievance:

> If the two parties are unable to reach a settlement, the dispute shall be reduced to writing and *the aggrieved party* shall notify *the other party* the dispute is being referred to a Board of Adjustment.

(Emphasis added.) Reference to the parties as "the aggrieved party" and "the other party" is, as was the case in *Drake Bakeries*, indicative that under the agreement either party could initiate the grievance procedure.

The second prong of the *Atkinson-Drake Bakeries* analysis is one of contractual interpretation — whether the language of Article XIII is broad enough to include alleged violations of the no-strike clause. Article XIII provisions were intended to cover any "dispute. . . involving the application or interpretation of the terms of th[e] agreement." This language is much more analogous to the language in *Drake Bakeries*, which the Court determined was broad enough to cover a violation of a no-strike clause, than to the corresponding provision in *Atkinson*.[4] The similarity between Article XIII

[4]The parties in *Drake Bakeries* had agreed to attempt adjustment of "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by" the agreement, whereas in *Atkinson*, the grievance procedure only applied to "any difference regarding wages, hours or working conditions . . . ."

and the language in *Drake Bakeries* together with the *Warrior & Gulf* presumption of arbitrability — that disputes should be arbitrated "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" — convinces us that the district court correctly concluded that under this collective bargaining agreement, the alleged violation of the no-strike clause was an arbitrable issue.

II.

In its trial memorandum, Burton Construction raised the issue of whether the unions were estopped from claiming any right of arbitration on the basis of certain equitable principles (*e.g.*, repudiation, laches, waiver) because of their dilatory pleading practices before the district court. Before confronting this issue, however, the district court had to determine whether judicial proceedings or arbitration was the proper forum for determining the merits of the equitable defenses raised by Burton Construction. Reluctantly, the district court answered that equitable defenses should also be decided by arbitration as mandated by Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487. We cannot agree with the district court's conclusion that in every instance where the parties of a section 301 action are bound by a collective bargaining agreement *Flair Builders* requires questions of waiver, repudiation, estoppel, laches or other equitable defenses to be determined by an arbitrator. We deem this broad conclusion to be subject to an important limitation.

The issue in *Flair Builders* was whether a party to a collective bargaining agreement may be so dilatory in making the existence of a "vaguely delineated dispute" known to the other party that a court is justified in refusing to compel the submission of an otherwise arbitrable issue to an arbitrator. The Supreme Court did not directly answer this question, but instead ruled that the arbitration clause in that case was so broadly worded as to include also the arbitration of the laches

issue. The Court, noting that its decision did not excuse a judicial examination of the scope of an arbitration clause as to whether equitable defenses should be decided by the arbitrator or the court, concluded that

> once a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to "any difference" between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement.

Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487, 491-492. Thus, *Flair Builders* did not determine that every equitable defense was an arbitrable issue, but that its arbitrability hinged upon the scope of the arbitration clause.

The equitable defense in the instant case arose from alleged "evasive" and "dilatory" pleading tactics by the unions in the district court proceedings, specifically the fact that the unions claimed that Local 1340 was not a party to the collective bargaining agreement, later admitting that while Local 1340 was not a party it was still bound by the provisions of the agreement. Courts must, of course, maintain judicial control of their own proceedings. Such power, we assert, is broad enough to include a court's determination of the validity of equitable defenses arising out of the action of parties before the court. To hold otherwise would unnecessarily hamper a court's control of its proceedings.

We do not read *Flair Builders* nor its progeny as requiring a district court to flatly forego the exercise of its traditional powers in favor of arbitration in determining the merits of alleged equitable defenses. After analyzing and reviewing *Flair Builders* and the subsequent cases citing it, we conclude that *Flair Builders* can be confined to the proposition that certain broadly-worded arbitration clauses require the arbitration of equitable defenses arising out of the formation of a collective bargaining agreement or the processing of a

grievance,[5] be they intrinsic procedural questions or extrinsic questions as defined by John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543.[6] This is not an unduly narrow reading of *Flair Builders*. Surely, no one would contend that an express waiver of a party's right to demand arbitration during the course of a case in district court would not be adequate legal grounds for the district court to proceed to the merits of an otherwise arbitrable dispute without requiring arbitration.

The test employed by the Supreme Court in *Flair Builders* to determine the arbitrability of the laches issue was whether the parties had, by the language of the collective bargaining agreement, intended that such a dispute be arbitrable. Following this test, we must determine whether Burton Construction

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[5]*See, e.g.*, H & M Cake Box, Inc. v. Bakery Workers Local 45, 1 Cir., 493 F_2 1226, *cert. denied*, 419 U.S. 839; General Dynamics Corp. V. Local 5, Marine and Shipbuilding Workers, 1 Cir., 469 F_2 848; Operating Engineers Local 139 v. Carl A. Morse, Inc., E. D. Wis., 387 F. Supp. 153; Local 552, Brick and Clay Workers v. Hydraulic Press Brick Co., S.D. Mo., 371 F. Supp. 818. *But see* Ladies' Garment Workers' Union v.Ashland Industries, Inc., 5 Cir. 488 F_2 641, *cert denied*, 419 U.S. 840.

[6]Two cases citing *Flair Builders*, however, have called for the arbitration of equitable defenses not arising out of the processing of a grievance or the formation of a collective bargaining agreement. Controlled Sanitation Corp. v. District 28, I.M. & A.W., 3 Cir., 524 F_2 1324, *cert. denied*, 44 U.S.L.W. 3471; Local 542, Operating Engineers v. Penn State Construction, Inc., M.D. Pa., 356 F. Supp. 512. In each of these section 301 actions, the defendants alleged arbitrability of the underlying dispute. Because of certain pleading delays on the part of the defendants, the plaintiffs in each case countered the arbitrbility claim, asserting that the defendants had waived or repudiated their right to arbitrate the dispute. As was the case with the district court in this instance, the courts held that *Flair Builders* mandated the arbitration of the waiver and repudiation defenses, but neither court focused on what we have determined to be a crucial distinction — a court's inherent and unrestricted power to control the judicial functions.

and the unions agreed to arbitrate any questions of equitable defenses arising out of misconduct in court cases in which the two were parties. As discussed earlier, the language of Article XIII was broad enough to include disputes dealing with violations of the no-strike provision and would probably cover the type of laches defense raised in *Flair Builders*, but we do not believe that the parties ever intended to include the arbitration of equitable defenses arising out of actions by a party in proceedings before a district court. Indeed, even had the parties so intended, we would conclude that such an agreement would clearly exceed the proper subject matter of a collective bargaining agreement and would not be enforceable in court; it would be improper for the prospective parties of a lawsuit to attempt by contract to bind the exercise of a court's inherent judicial function.

Allowing federal courts to retain jurisdiction under section 301 of the National Labor Relations Act of an otherwise arbitrable dispute because of certain misconduct of one of the parties in the judicial proceedings themselves which gives rise to some type of estoppel to claim arbitrability is not inconsistent with the strong national labor policy favoring arbitration of labor disputes. As noted earlier, this policy is partly premised on the understanding that

> arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . . An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83. If it can be concluded with "positive assurance" that the parties did not intend to arbitrate certain disputes, the policy favoring arbitration does not come into play. As discussed above, the parties in this case neither

intended nor had the power to require arbitration of certain equitable defenses that have traditionally been decided exclusively by the courts.

In conclusion, therefore, we hold that the trial court erred in ruling that it was "bound" by *Flair Builders* to submit to arbitration the question of whether the unions should be prevented from demanding arbitration because of "evasive" and "dilatory" pleading practices before the court. It is entirely appropriate in some instances for a district court to retain section 301 jurisdiction of an arbitrable dispute where, because of conduct before the court, it may be deemed that a party is prevented on the basis of some equitable principle from asserting a right to arbitration. Whether the instant case is one such instance has not been decided. Therefore, we remand this case for such a determination. If the district court finds that there has been no estoppel or waiver because of the unions' conduct in pleading, then it is proper to order arbitration of the underlying dispute — the alleged violation of the no-strike clause. If on the other hand it is determined that the unions have waived their right to arbitration, or in some other way should be prevented from asserting his right, because of conduct which falls within the control of the court, then the district court can properly proceed to the merits of the underlying dispute.

In sum we conclude that the enumerated equitable defenses discussed are, in general, mandated by *Flair Builders* to the arbitrator for determination of the continued vitality of the contractual arbitration process. However, if such defenses arise solely during the course of the judicial process the arbitrator is not the one to determine whether the judicial process has been abused by either party or at all or whether an equitable defense to the main dispute has been established during the course of the judicial trial by in-trial conduct.

Remanded.

Supreme Court, U. S.
FILED
AUG 11 1980
MICHAEL RODAK, JR., CLERK

79-1712

In the Supreme Court of the United States

OCTOBER TERM, 1979

CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO and its affiliated LOCAL UNION 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO,
Petitioners,
vs.
REID BURTON CONSTRUCTION, INC., a Colorado Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

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79-1712

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Petitioners,	)
vs.	)
REID BURTON CONSTRUCTION, INC., a Colorado Corporation,	)
Respondent.	)

The Petitioners, Carpenters District Council of Southern Colorado and Local Union 1340 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO [hereinafter, District Council and Local 1340], respectfully submit the following reply brief to the Respondent's Brief in Opposition to the Petition for Writ of Certiorari.

REPLY ARGUMENT

BURTON'S ANALYSIS IN ITS OPPOSITION BRIEF IS SUPERFICIAL AND FAILS TO ADDRESS THE FUNDAMENTAL QUESTIONS HEREIN: (1) WHETHER THE BASES FOR THE COURT OF

APPEALS' FINDING OF CONSTRUCTIVE WAIVER HAVE ANY SUPPORT IN PRECEDENT OR LOGIC, AND (2) WHETHER THIS COURT SHOULD ESTABLISH THE PARAMETERS OF THE CONSTRUCTIVE WAIVER DOCTRINE IN §301 ACTIONS.

In its brief opposing the Petition for a Writ of Certiorari, the Respondent, Reid Burton Construction, Inc. [hereinafter, Burton], argues that (1) the clearly erroneous standard under Fed.R.Civ.P. 52 obtained as to the District Court's findings and (2) the Court of Appeals' decision does not conflict with any decisions of other courts of appeals. This reply will address only the second of these arguments in detail.[1]

I.

As stated in the Petition, the Court of Appeals' affirmance was predicated on three bases: (1) Denial by Local 1340 of party status under the collective bargaining agreement; (2) active participation in the various pre-trial aspects of the litigation; and (3) assertion of the arbitration provision as an affirmative defense without insisting "immediately" that the action be stayed pending arbitration. Each of the bases is analytically distinct, and the Petition addressed them separately. Burton's opposition brief, however, fails to respond in any

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[1]Burton's argument as to the applicability of the clearly erroneous standard is that, because the "Unions' conduct in pleading" was at issue in the remand, the District Court's determination was dependent upon the facts of the case. Opposition Brief at 8, 10. That analysis, however, ignores that the clearly erroneous standard applies only to findings of fact and that there were no issues of controverted fact below. Rather, virtually all relevant facts were contained in the various pleadings. Thus, as stated in note 3 of the Petition, this a "paper case" which presents the issue of what legal standard should be applied to uncontroverted facts. The District Court's conclusory finding of waiver, premised on an unarticulated legal standard, is not entitled to appellate deference under Rule 52.

meaningful fashion to the Petition's analysis but, instead, merely contends that the Court of Appeals, "in keeping with [the] long standing policies and the standards" of other circuits, correctly found waiver because the District Council and Local 1340 did not request "arbitration at the outset, as was their duty." [Opposition Brief at 13]

Aside from the Court of Appeals' decision herein, there is no decision which requires a defendant, so as to preserve an arbitration defense properly raised and consistently maintained, to move immediately for a stay pending arbitration. Such a rule, otherwise inconsistent with the liberal pleading policies of Rule 8(e),[2] is a glaring example of form displacing substance. Quite obviously, the very purpose of pleading the arbitration defense is to bring the opposing party's attention to an alleged obligation to exhaust contractual methods of dispute resolution before commencement of a civil action. Whether the opposing party chooses to exhaust those methods is, nonetheless, its own decision. There is accordingly no obligation for a defendant, such as the District Council or Local 1340, to initiate grievance or arbitration proceedings as to a plaintiff's contractual dispute. As stated in the Petition, various decisions have recognized this self-evident notion.[3]

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[2]See generally 2A J. MOORE, FEDERAL PRACTICE §§8.31[2], 8.32 (2d ed. 1979); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §§1281-84 (1969).

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[3]*Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 70 F.2d 297, 299 (2d Cir. 1934), *aff'd*, 293 U.S. 449 (1935); *Kulukundis Shipping Co. S/A v. Amtorg Trading*, 126 F. 2d 978, 989 (2d. Cir. 1942); *Martin Marietta Aluminum, Inc. v. General Electric Co.*, 586 F.2d 143, 146 (9th Cir. 1978). Burton attempts to distinguish these decisions upon various, alleged factual differences. Opposition Brief at 12n.3. However, even if one assumed that Burton correctly identified factual differences, those differences are not material to the question of whether the District Council and Local 1340 had an affirmative obligation to request arbitration of Burton's dispute, except as to *Martin Marietta*. That decision, Burton states, is inappropriate because the contract "specifically *relieved* the defendant of *any* obligation to request arbitration." *Ibid.* (Cont'd)

The imposition of a duty to demand arbitration immediately may also mandate an essentially futile exercise. Instantly, Burton denied its obligation to arbitrate the issue of whether the no-strike provision had been violated. Evidence was taken on this issue during trial, and Burton appealed the District Court's decision on such point. [Petitioners' Appendix A at A-10-11 (District Court Memorandum Opinion (November 17, 1974); Petitioners' Appendix B at B-4-8 (Court of Appeals Opinion (May 6, 1976)] Thus, aside from satisfying an arbitrary requirement first enunciated five and half years after the litigation commenced, immediately demanding arbitration would seemingly have served no purpose.[4]

II.

Burton's Opposition Brief virtually ignores a specific response to those portions of the Petition dealing with the Court of Appeals' reasoning as to predicating waiver on Local 1340's denial of "party" status and the Petitioners' active participation in pre-trial preparation. As developed in the Petition, the Court of Appeals' conclusion that waiver of the arbitration defense occurred through Local 1340's initial denial of §301 jurisdiction is inconsistent both with the Federal Rules of Civil Procedure and with *Controlled Sanitation*. Burton's only response

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[3](cont'd) (emphasis in original). A review of the relevant contractual language, though, indicates only that the aggrieved party was responsible for initiating the arbitration process. 586 F.2d at 145. Article XIV of the Building Construction Agreement herein similarly required the "aggrieved party" to refer a dispute to a board of adjustment, which board must hear a grievance before it is processed to arbitration. Petitioners' Appendix D at D-1. The board, in turn, is responsible for selecting an impartial chairman to serve as the arbitrator.

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[4]The Court of Appeals' reasoning is, of course, dependent upon viewing as a nullity the timely assertion of the arbitration defense and its consistent reiteration in various pre-trial pleadings. See Petition at 14n.5. Nonetheless, there is no legal or logical basis for such view. See *Controlled Sanitation Corp. v. Machinists District 128*, 524 F.2d 1324, 1328n.3 (3d Cir. 1975), *cert. denied*, 424 U.S. 915 (1976).

to this position is a quotation from the Court of Appeals' attempt at distinguishing *Controlled Sanitation*. [Opposition Brief at 11] Significantly, the Court of Appeals' only basis for distinguishing *Controlled Sanitation* was that the defendants therein "clearly reserved the right that the dispute should be submitted to arbitration" if a binding collective bargaining agreement was found. For those reasons noted above, however, the Court of Appeals' reasoning concerning the purported obligation to demand arbitration immediately is specious, and its effort to distinguish *Controlled Sanitation* must, therefore, fail.

Nothing in the Opposition Brief responds to the Petition's analysis of the Court of Appeals' conclusion that active participation in a civil action may result in wavier of an arbitration defense. Nonetheless, as stated in note 15 of the Petition, Burton had available to it various procedural devices, including a motion to strike and a motion for protective orders, to obviate any alleged prejudice flowing from the use of the discovery procedures not available in arbitration. Moreover, mere use of discovery in preparation for trial, when the arbitration defense has been properly preserved, can hardly be viewed as inconsistent with such defense – espcially where the substantive scope of the arbitration provision's coverage is challenged. Such a *per se* waiver rule would force litigants to risk either waiver of the arbitration defense or inadequate trial preparation and is diametrically opposed to modern pleading practices. It is hardly logical to permit defendants to raise and maintain multiple affirmative defenses but, simultaneously, to find one of those defenses constructively waived by pre-trial preparation as to other defenses or claims. Certainly, there is no question herein that the District Council or Local 1340 intentionally abandoned the arbitration defense, and, absent intentional abandonment, application of a constructive waiver doctrine

predicated, at least in part, upon active pre-trial preparation is manifestly inappropriate.

III.

Lastly, it must be underscored that the Court of Appeals' decision raises an important, and yet unresolved, question as to when constructive waiver of the arbitration defense is appropriate in §301 actions. As stated in the Petition, a central policy consideration in the *Steelworkers Trilogy* and later decisions has been the rigid circumscription of opportunities to evade a promise to arbitrate through pre- or post-arbitration proceedings. That policy consideration is obviously disserved by the Court of Appeals' recognition and application of a constructive waiver doctrine under the circumstances herein. Moreover, even if such a doctrine is to be countenanced, this Court should set the applicable parameters. The Court of Appeals' decision rests on clearly fragile reasoning and runs counter both to the spirit of the *Trilogy* and to accepted pleading precepts. Resolution of this issue is significant to future application of §301.

CONCLUSION

The Petitioners respectfully request the Court to issue a writ of certiorari to the Tenth Circuit Court of Appeals for review of its decision herein.

Respectfully submitted,

McKENDREE & LUBIN
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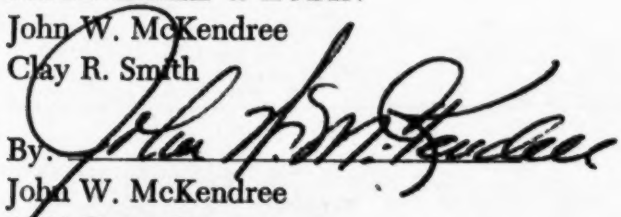
By: 
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